TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~428.~~ 193

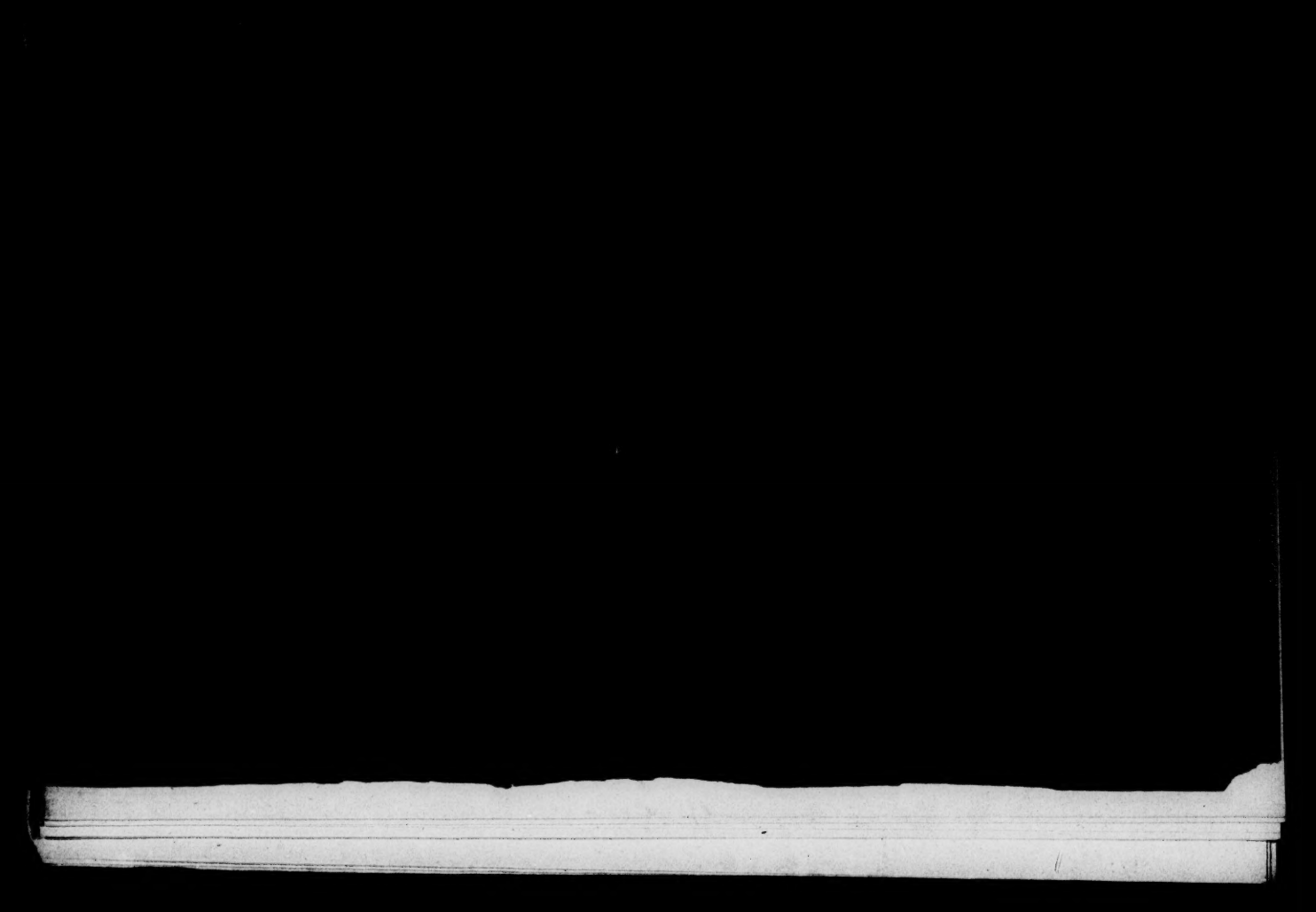
THE SAINT PAUL WATER COMPANY, PLAINTIFF IN ERROR,

vs.

EDWARD B. WARE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED NOVEMBER 28, 1871.



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INDEX.

	Original.	Print.
Writ of error	1	1
Return	3	1
Citation	4	1
Complaint	6	2
Summons	20	8
Answer	22	8
Jury	24	9
Verdict	26	10
Bill of exceptions	27	11
Judgment	42	17
Clerk's certificate	44	18

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America in and for the district of Minnesota, greeting:

Because in the record and process and also in the rendering of judgment in a suit before you or some of you between Edward B. Ware, plaintiff, and the St. Paul Water Company, defendant, in a plea which is in the said circuit court, a manifest error hath happened, to the great damage of the said defendant, the St. Paul Water Company, as it says, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there
2 held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this 25th day of February, in the year of our Lord one thousand eight hundred and seventy-one and of the independence of the United States the ninety-fifth.

[SEAL.]

H. E. MANN,
Clerk U. S. Cir't Court Dis't Minn'a.

3 The answer of the judges of the circuit court of the United States for the district of Minnesota in the eighth circuit, in the within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States within mentioned in a certain schedule to this writ annexed as within it is commanded.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, the 31st day of August, in the year of our Lord one thousand eight hundred and seventy-one and of the independence of the United States the ninety-sixth.

[SEAL.]

H. E. MANN,
Clerk U. S. Circuit Court District of Minnesota.

(Indorsed:) United States circuit court, district of Minnesota. Edward B. Ware vs. The St. Paul Water Co. Writ of error.

4 UNITED STATES OF AMERICA, *ss:*

To EDWARD B. WARE, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein the St. Paul Water Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the

judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rensellaer R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota, this 25th day of February, in the year of our Lord one thousand eight hundred and seventy-one.

R. R. NELSON,
One of the Judges of the Circuit Court of the United States for the District of Minnesota.

5 (Indorsed:) S. C. United States. The St. Paul Water Company, pl'ff in error, v. Edward B. Ware, def't in error. Citation.

Due service of the within is admitted Feb'y 25, 1871.
C. K. DAVIS,
Pl'ff's Att'y.

Filed February 25, 1871. H. E. Mann, clerk. Allis, Gilfillan, & Williams, for plaintiff in error.

6 *Schedule referred to in return to annexed writ.*

United States circuit court for the district of Minnesota.

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota:

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that, on the second day of August, in the year of our Lord one thousand eight hundred and seventy, came Edward B. Ware, the plaintiff above named by Cushman K. Davis, his attorney, and filed in the clerk's office of said court his complaint; which complaint is in the words and figures following, viz:

United States circuit court district of Minnesota.

EDWARD B. WARE, PLAINTIFF,
vs.
THE SAINT PAUL WATER COMPANY, DEFENDANT.

7 The complaint of the above-named plaintiff states that at all the dates hereinafter mentioned he was, and ever since has been, and now is, a citizen of the State of Mississippi and a resident of said State; that the defendant is a corporation duly created and organized under various acts of the legislature of the Territory and of the State of Minnesota, to wit, an act entitled "An act to incorporate the Saint Paul Water Company," approved May 23d, 1857; an act entitled "An act to amend an act entitled 'An act to incorporate the Saint Paul Water Company'" approved March 30th, 1858; an act entitled "An act to amend an act entitled 'An act to incorporate the Saint Paul Water Company' approved May 23d, 1857," approved March 8, A. D. 1861; an act entitled "An act to revive, amend, and continue an

act entitled 'An act to incorporate the Saint Paul Water Company" approved May twenty-third, eighteen hundred and fifty-seven, and to revive the corporation thereby created, "approved March, 2nd, 1865; an act entitled "An act to amend an act to incorporate the Saint Paul Water Company, approved May 23d, 1857, approved March 20th, 1858, approved January 25th 1866;" an act entitled "An act to amend the charter of the Saint Paul Water Company and the amendments thereto," approved February 4th, 1868; an act entitled "An act authorizing the Saint Paul Water Company to re-locate its line and extend its works," approved February 8th, 1869.

8 That the only place of business of said defendant has ever been in the city of Saint Paul, county of Ramsey, and State of Minnesota.

That, by an ordinance of the city of Saint Paul, county of Ramsey, State of Minnesota, adopted October 7th, 1869, it was enacted and agreed by the said defendant, among other things, that "the said water company expressly agree to protect all persons against damage by reason of excavations made by them in said city in laying pipes, and to keep said excavations properly guarded day and night, and to become responsible for all damages which may occur by reason of neglect of their employees in the premises; and that the streets and highways of said city shall not be unnecessarily obstructed or encumbered in laying said water-pipes."

That a copy of said ordinance is hereto annexed, marked Exhibit "A," and made a part of this complaint.

That the said ordinance was duly published and promulgated long before any of the dates hereinafter given.

That, long before any of said dates, the defendant duly accepted assented, and agreed to said ordinance, and all and singular its provisions, and ever after, and particularly in making the excavations and doing the work hereinafter mentioned, proceeded thereunder, and also, under the authority conferred upon it by the various acts above pleaded.

9 That, for many years prior to any of the dates hereinafter given, a certain street in said city, called St. Peter street, had been duly opened and graded by said city, and was and is now a public street and highway of said city, and ever has been much used and travelled upon by the citizens of said city, and by the public in general.

That, on or about July 14, 1870, the defendant, having previously located its line along said Saint Peter street, was engaged in excavating along said street, and in there laying its pipes, and for the purpose of laying its said pipes, and of extending and constructing its works along said street in pursuance to the aforesaid acts and ordinance.

That, in so doing, and for such purpose, it then and there made deep, dangerous, and wide excavations and embankments along and across said street; and that in so doing it then and there unnecessarily and carelessly and negligently obstructed and encumbered the same.

That it never, at any time, kept such excavations properly or at all guarded, as required by law.

That it not only unnecessarily, negligently, and carelessly obstructed and encumbered the said street for the purposes aforesaid by the said excavations; but it did also, then and there unnecessarily and carelessly and negligently obstruct and encumber the same by its

10 steam-engines, steam-drills, and other machinery, the nature of which this plaintiff does not know and cannot state, which were then and there used and employed by it and its employees, in

making said excavations and in laying said water-pipes, and particularly in laying said water-pipes.

That it never at any time kept said steam-engines, steam-drills, or the said other machinery properly or at all guarded, as required by law.

That, on or about July 14, 1870, and while defendant was doing the acts and suffering the omissions aforesaid, this plaintiff was lawfully travelling and passing along said street, and was, in so doing, being conveyed in a carriage drawn by a horse, and that this plaintiff was then and there wholly unaware of the existence of any of such embankment or excavation or steam-engine or steam-drill or of any of the aforesaid machinery or of any of the unlawful, negligent, or careless acts of the defendant as aforesaid, and that then and there, without warning or notice, and with knowledge of this plaintiff's position, the said defendant did, by its agents and employees, who were then and there acting for it in the premises, negligently suffer and permit the said steam engine and drill and machinery, which was then and there under its and their control to be set in operation, while this plaintiff was, as aforesaid,
11 travelling on said street and within twenty feet of said engine and machinery, and was among and by said embankments and excavations, and that in so doing the same, to wit, said engine, drill, and machinery made a loud, sudden, and alarming noise, by which the horse aforesaid became uncontrol'able and frightened, and thereby became unmanageable on account of the same and on account of the said embankments and excavations and their aforesaid condition, and threw this plaintiff violently from said carriage to the ground, and that thereby caused the leg of this plaintiff to be broken in two places, and fractured the bones of his leg, and otherwise cut, bruised, wounded, and lamed this plaintiff, and made him sore, sick, and disabled, and incapacitated him from pursuing any occupation, and permanently impaired and injured the leg of said plaintiff and his health, and thereby compelled him to incur great expense for medical treatment and nursing and medicines and board and lodging, to his damage ten thousand dollars.

That, in all the acts of the plaintiff in the premises, he committed no negligence; that he was wholly without negligence by him committed or suffered, nor did any act or omission of him, in any manner, contribute to the doing said injuries and harm.

12 That, in all the aforesaid premises, the defendant was negligent and careless; that the aforesaid injuries to the plaintiff were wholly occasioned by the negligence and carelessness of the defendant and of its employees who were then and there in its employ, and acting for it under its immediate control and supervision, and not otherwise.

Wherefore he demands judgment against the defendant for the sum of ten thousand dollars, with interest from July 14, 1870, and for his costs.

C. K. DAVIS,
Pl'ff's Att'y, St. Paul, Minn.

EXHIBIT "A."

Saint Paul Water Company.

The common council of the city of Saint Paul do ordain as follows:

SECTION 1. That the common council of said city do hereby direct that the Saint Paul Water Company shall erect fire-plugs and lay pipe to connect the same with main pipes for the prompt extinguishment of

fires. That said company shall erect such fire-plugs, at the rate of ten (10) plugs for each and every mile of street-mains so laid in said city, at such points and places as may be designated by the chief engineer
13 of the fire department, and approved by the common council. And for every ten plugs so erected and put and kept in successful operation, as hereinafter provided, the said city will pay to the said Saint Paul Water Company the sum of six hundred dollars per year; such compensation having been mutually agreed upon between said city and said company, under the provisions of section 2 of "An act to amend the charter of the Saint Paul Water Company, and the amendments thereto," approved February 4, 1868: *Provided*, That the said direction to erect said fire-plugs, and the compensation to be paid therefor, shall be subject to the conditions and stipulations hereinafter provided.

SEC. 2. The said direction to erect fire-plugs and agreement to pay therefor shall not be construed to extend to more than ten (10) miles of street-mains; but the common council reserves the right to direct the erection of more than ten plugs per mile within said ten (10) miles, which may be done by a resolution passed by two-thirds of all the members of the common council, and in such case the said water company shall be entitled to a compensation of thirty dollars for each additional fire-plug within said ten miles of street-main. The said common council reserves the right to direct the erection of further plugs when said company shall lay more than ten miles of street-main; but the com-
14 pensation therefor shall be subject to agreement between the city and said water company, and shall be evidenced by an amendment to this ordinance: *Provided*, That such compensation shall not exceed the rate per mile under this ordinance.

SEC. 3. The said water company shall conduct water from Lake Phalon to said city and lay their mains along Seventh street to Jackson street, down Jackson to Third, up Third to Pleasant, and up Fort from Third to Ramsey; up Wabasha from Third to Seventh; from Wabasha along Tenth to College avenue, at junction of Rice street, up Saint Peter street from Third street to Summit avenue, and up Seventh street from Wabasha street to Third street, as a part and portion of the first ten (10) miles of street mains, with such mains on other streets as they may see fit to lay; and said ten miles of street-mains shall be laid, and the fire-plugs thereof supplied with water before the first day of November, A. D. 1870: *Provided*, That no legislative extensions of the charter of said company, or their rights and privileges thereunder, shall in any manner operate to extend their rights under this ordinance unless such extension is ratified and confirmed by said common council.

SEC. 4. The said water company guarantee and agree that the said fire-plugs shall be of a substantial and approved kind, of the usual
15 capacity for the supply of fire-engines, with appendages, valves, connections, and fixtures of easy access, and suitable to the climate; that each plug so erected shall be kept in good working order and condition at all times and seasons; and said company will keep the same, and their connections, in good repair, and relay and replace the same, or any part thereof, that may become injured, broken, or destroyed from any cause whatever, at their own cost and expense, excepting only damages thereto done by any officer of said city, or under their direction while in the proper discharge of their official duties. And for each and every week during which a full supply of water cannot be obtained from any one of said fire-plugs, there shall be deducted from the pay of said company the sum of ten dollars for each plug so defective for each

week; and the certificate of the chief engineer of the fire department, or of the street commissioner, chief of police, or any police officer, filed in the office of the comptroller, certifying to the defective condition of any fire-plug for a period of one week, shall be prima-facia evidence of such fact, and shall be authority for such comptroller to deduct such amount from the accounts of said water company before allowance: *Provided*, That the common council may remit the said deduction in their discretion: *And provided further*, That the deductions on any one plug shall not exceed the pro rata of annual payment of said plug.

16 SEC. 5. The said water company shall not be compelled to erect any of said plugs in such places that its valves or connections will be exposed to frost or other injury by reason of cellars under sidewalks or other exposures. No person shall make any excavations under or near any fire-plug or its connections, which shall expose the same to danger or damage from frost or other cause, under a penalty of not less than five dollars fine, to be recovered by complaint before the city justice, in addition to personal liability to said water company for actual damages sustained.

SEC. 6. The said water company expressly agree to protect all persons against damages by reason of excavations made by them in the said city, in laying pipes, and to keep the said excavations properly guarded by day and night, and to become responsible for all damages which may occur by reason of neglect of their employees in the premises; and that the streets and highways of said city shall not be unnecessarily obstructed or encumbered in laying said water-pipes.

SEC. 7. The first mile of fire-plugs shall commence at some point where the main pipe strikes Kiltson's addition, and west of the line of Kiltson street, in said addition. The chief engineer of the fire department shall, as soon as said company have definitely located the route for any one mile of street-main, select suitable points for the location of the fire-plugs and report the same to the common council, and they shall

17 locate the same by resolution, as soon thereafter as practicable. Any change in the location of a fire-plug thereafter shall be made by resolution, and at the expense of said city.

SEC. 8. The said company shall notify the common council in writing as each mile of fire-plugs is completed, and the water in the same, and the liability of the city for the payment of each mile shall date from the date of such notice. The said water company shall receive payment for said plugs semi annually, at the rate of six hundred dollars per mile per annum for each mile of ten plugs, and thirty dollars per annum for such additional plugs as the common council may direct under section 2. No payments shall be made for plugs erected in fractional parts of a mile, unless erected under a resolution of the common council under section 2.

SEC. 9. The said water company shall render their accounts semi-annually at the first meeting of the common council in December and June of each year; the said accounts shall be referred to the committee on fire department, who shall report all deductions and objections thereto for the action of the council, and, after allowance, shall be audited by the comptroller, and the common council shall make provision for the payment of said account, as allowed on the first of January and July after such accounts are rendered: *Provided*, That the

18 said water company shall not stop the supply of water in said plugs by reason of any delay not exceeding one year in the allowance of payment of said accounts: *And provided further*, That said plugs shall always by accessible to the fire department and fire-engines

of said city, for the purpose of extinguishment of fires, and for reasonable practice and cleaning of fire engines and apparatus.

SEC. 10. The said company shall lay all street-mains, so as not to interfere with the surface drains or gutters on the side, nor with a space sufficient for the construction of sewers in the centre of streets. On all streets of sixty-six (66) feet wide the said mains shall be laid nineteen (19) feet from the property-line, and fourteen (14) feet from the centre line of street; on streets sixty (60) feet wide, eighteen (18) feet from property-line, and twelve (12) feet from centre line of street; on streets fifty (50) feet wide, fifteen (15) feet from property-line, and ten (10) feet from centre line of street, with proportionate distances for streets of different width.

SEC. 11. The said company, in making excavations, shall leave all streets, cross-walks, and other city improvements, public or private, and all railway tracks and crossings, and all gass-pipes an' connections in as good order and condition as they find the same, and shall not unnecessarily obstruct the said streets or improvements, or obstruct or delay the operation of railways, or of the Saint Paul Gas Company, and shall become responsible for and pay all damages which may occur to said railways, or to said gas company, by reason of excavations on said streets, or by reason of injuries, delays, or obstructions to any railway or said gas company.

SEC. 12. That the said Saint Paul Water Company and the Saint Paul Gas-Light Company shall hereafter lay their main pipes on opposite sides of the streets of the city, at a distance of not less than twelve feet in the centre, in such streets as are not less than sixty feet in width, and not less than eight feet from the centre in such streets as are less than sixty (60) feet in width; and the company which shall first file with the city clerk a declaration of intention to lay their main pipes along a portion or all of a particular street, accompanied by a diagram showing the length of such contemplated work, shall have the preference as to the side of such road, provided the said work shall be commenced within twenty days after the filing of such declaration of intention and diagram, and completed within a reasonable time thereafter: *Provided*, That the said Gas Light and Water Companies shall not be prohibited from laying their main pipes in any part of the following streets, to wit: From the corner of Tenth to John streets, along Herkimer avenue, to the city limits, and also along that part of Seventh street from the corner of block thirty-three, in Kiltson's addition to the city limits, where said Seventh street strikes the same, and also along such part of Dayton's avenue as lies between Summit avenue and the city limits.

This ordinance shall take effect from and after its publication.

The rules were suspended, the ordinance read the second time, and passed.

Yeas: Ald. Berkey, Cummings, Farrell, Green, Junson, Mitsch, Willins, and Mr. President—8.

Whereupon, upon application of said plaintiff, by his said attorney, a writ of summons was duly issued out of said court, under the seal thereof, duly tested, and in the words and figures following, viz:

Summons.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

In the circuit court of the United States for the district of Minnesota.

EDWARD B. WARE
against
THE SAINT PAUL WATER COMPANY.

The President of the United States of America to the defendant above named, greeting:

21 You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office within thirty days after the service hereof, excluding the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in said district of Minnesota, this second day of August, in the year of our Lord one thousand eight hundred and seventy, and of our independence the ninety-fifth year.

[SEAL OF COURT.] H. E. MANN, *Clerk.*

C. K. DAVIS,
Plaintiff's Attorney.

Which said summons was afterwards duly returned into the clerk's office of said court by the United States marshal of said district, by him indorsed as follows, to wit:

22 DISTRICT OF MINNESOTA, *ss:*

I hereby certify that I served the within summons on the within-named the Saint Paul Water Company, personally, by handing to and leaving with C. F. Leonard, secretary of the said company, a true copy hereof at St. Paul, in said district, Aug. 3d, 1870.

AUG. ARMSTRONG,
U. S. Marshal,
By J. R. CLEVELAND,
Deputy.

Fees, $2.12.

And, afterwards, to wit, on the 23d day of August, A. D. 1870, came the said defendant, the Saint Paul Water Company, and filed its answer to the plaintiff's complaint in the clerk's office of said court, appearing by Messrs. Allis, Gilfillan and Williams, its attorneys; which anwer is in the words and figures following, to wit:

Circuit court of the United States for the district of Minnesota.

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

The defendant, for answer to the complaint herein, denies each and every allegation contained in said complaint from and after the
23 words "That, on or about July 14, 1870," on the third page thereof to the end of said complaint.

Wherefore defendant demands judgment for costs.

ALLIS, GILFILLAN & WILLIAMS,
Def't's Att'ys.

STATE OF MINNESOTA,
County of Ramsey, ss:

James Gilfillan came before me personally, and, being duly sworn, doth say that he is president of the Saint Paul Water Company, the defendant in the above-entitled action; that the foregoing answer is true, of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

JAMES GILFILLAN.

Subscribed and sworn to before me on this 22nd day of August, A. D. 1870.

H. E. MANN, *Clerk.*

And, afterwards, to wit, at a stated term of said court begun and held at the city of Saint Paul, in said district, on the third Monday, being the 17th day, of October, in the year of our Lord one thousand eight hundred and seventy, on the second day of said term, and the eighteenth day of said October, the following proceeding among others was had, to wit:

24 EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

This cause coming on to be heard, C. K. Davis, esq., appears for the plaintiff, and Messrs. Allis, Gilfillan & Williams appear for the defendant, whereupon a jury being come, to wit, Winthrop Davis, Robert Winnegar, H. Swartwout, jr., E. F. Hurd, John Oswald, O. A. Paige, David Graham, Joseph Lewis, A. P. Lane, W'm Brockway, John Robinson, L. Z. Rogers, who are duly impannelled and sworn.

C. K. Davis opens the case on the part of the plaintiff.

Edward B. Ware is sworn and examined as a witness for the plaintiff.

Dr. Boardman is sworn and examined as a witness on the part of the plaintiff.

N. J. Watts " " " " " " "

C. D. Gilfillan " " " " " " "

And here the plaintiff rests his case.

The defendant here moves the court to instruct the jury to find a verdict for the defendant, which is argued by the attorneys of the respective parties.

And, on the third day of said term, and the 19th day of said October, the following proceeding, among others, was had in said court, to wit:

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

The jury, heretofore impannelled in this cause, being called, came.
The motion of the defendant that the court instruct the jury to find a verdict for the defendant coming on to be further heard, was further argued by counsel and submitted to the court, and by the court denied.
Case opened on the part of the defendant by James Gilfillan, esq., its attorney.
C. D. Gilfillan recalled and examined as a witness for the defendant.
Thomas H. Wise is sworn and examined as a witness for the defendant.
Dennis Igo " " " " " " " " "
Mathew Sweeney " " " " " " " " "
Martin Whalon " " " " " " " " "
Thomas Larity " " " " " " " " "
And here the defendant rests its case.
E. B. Ware is re-examined as a witness for the plaintiff.
And here the plaintiff rests his case.

And, on the fourth day of said term, and the 20th day of said October, the following proceeding, among others, was had in said court, viz:

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

The jury heretofore impannelled in this cause being called came.
26 Lorenzo Allis, esq., sums up for the defendant.
C. K. Davis, esq., sums up for the plaintiff.
Charge is given the jury by the court, and they retire in charge of an officer duly sworn and qualified to attend them, to consider of their verdict.
The hour for adjourning court having arrived, and the jury not having returned into court with their verdict, the attorneys for the respective parties consenting thereto, it is ordered if the jury agree upon a verdict before the opening of court to-morrow morning, they may seal up their verdict, and present the same to the court at its opening to-morrow morning.

And on the fifth day of said term, and the 21st day of said October, the following proceeding among others was had in said court, viz.

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

The jury impannelled in this cause being returned into court, say they find a verdict for the plaintiff, for the sum of two thousand two hundred and fifty dollars.

Whereupon the defendant, by its attorneys, gave notice of a motion for a new trial.

On motion of defendant, ordered that all further proceedings in
27 this cause be stayed for twenty days, and that the defendant have that time to propose a bill of exceptions.

And afterwards, to wit, on the 16th day of February, A. D. 1871, came the said defendant by Messrs. Allis, Gilfillan & Williams, its attorneys, and filed in the clerk's office of said court, its bill of exceptions, duly allowed, signed, and sealed by the Honorable Rensselaer R. Nelson, the judge of said court, presiding at the time of said trial; which said bill of exceptions is in the words and figures following, to wit:

Circuit court of the United States for the district of Minnesota.

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

Be it remembered that at the term of this court held on the 17th day of October, A. D. 1870, at Saint Paul in said district, to wit, on the 19th day of October, 1870, this cause came on to be tried, and a jury having been duly impannelled to try the issues, the plaintiff to maintain the issues on his part, gave evidence tending to show that, at the time alleged in the complaint, the defendant, by and through a contractor, was engaged in making an excavation, and laying down its pipes therein, for conducting water in and along Saint Peter street, in the city of Saint Paul; that said excavation extended at the said time from a point below the intersection of Eighth street with said St. Peter street to a point at or near the intersection of Ninth street with said St. Peter street;
28 that said excavation with the embankments made by throwing out the earth and soil therefrom occupied the greater part of the width of St. Peter street between said points, leaving on the east side of the street a pass sufficiently wide to admit of a buggy being driven through, but not wide enough to turn a buggy in; that along said excavation from the surface of the ground down to the depth of one and a half or two feet was earth; below the earth to the depth of from six to eighteen inches was loose rock, and below the loose rock was solid rock from twelve to twenty feet in depth; that the excavation through the solid rock was done by drilling and by blasting with gunpowder; that the drilling, was done by means of a steam-drill; that the engine, or boiler of the engine which propelled the drill, rested on a truck, so that the top was about ten feet above the surface of the ground, and was about three feet in diameter, and at the time mentioned in the complaint stood at the edge of the excavation, and a few feet above the intersection of Eighth with St. Peter street.

And further to maintain the issues upon his part, the plaintiff gave evidence tending to show that, on the day alleged in the complaint, and about five o'clock in the afternoon, the plaintiff and one Crindell were riding in a buggy drawn by one horse, and turned from Ninth or Tenth street into St. Peter street and drove down along the said pass on the east side of St. Peter street toward Eighth street; that said steam engine and drill were not in operation, and were not seen by plaintiff or Crindell until they had driven to within nine ten feet of them; that
29 there was no notice at the point where they turned to go on St. Peter street, or at any other point, of the existence of said engine

or machinery, or of the intention to put it in operation, and that there was no barricade of St. Peter street at any point. The engine was visible from the point where the plaintiff turned into St. Peter street, and from that point until plaintiff reached it.

And further to maintain the issues on his part, plaintiff gave evidence tending to show that when he and Crindell in said buggy came within ten feet of said engine, the persons in charge thereof suddenly, and without giving any notice or warning of their intention so to do, set said engine and drill in operation, thereby causing a loud and alarming noise, and at the same time one of the persons operating said engine and drill, ran into the street in front of plaintiff's horse, at the same time throwing up his hands in the direction of the horse, and that the horse was freightened at the noise made by the engine and drill, and the actions and gestures of the man, and suddenly sprang to one side, ran upon the sidewalk on the east side of the street, overturned the buggy, and injured plaintiff.

And further to maintain the issues on his part, plaintiff called as a witness, Charles D. Gilfillan who, having been duly sworn, deposed that the work in question was begun in July, 1870, and was done in accordance with the ordinances pleaded in the complaint. "I was present every day and superintended the work."

30 Upon cross-examination the witness deposed that "the men engaged in the work were in my employ. I had a written contract with the water company to do this work. This is the contract under which the work was done."

Upon re-direct examination the witness deposed: "I was a director at the time of the contract." That the foregoing, with said contract, was all the evidence introduced which tended to show that the work was done through a contractor. The said contract was then put in evidence, and is in the following words and figures:

"This agreement, made and entered into this eighth day of January, A. D. 1869, by and between Charles D. Gilfillan, of the city of Saint Paul, Minnesota, and the Saint Paul Water Company, parties of the first and second part, respectively, witnesseth:

"That the said Gilfillan, party of the first part, for and in consideration of the covenants and agreements on the part of the said party of the second part, by it to be kept and performed, does hereby covenant and agree to and with said party of the second part as follows, viz:

"That he will furnish all the materials for erect , and construct in good workmanlike order and condition the contemplated water-works of said company in the city of Saint Paul, State of Minnesota, and to complete the same by the first day of November, A. D. 1870, said works to comprise thirteen miles of street-maines, including the main from Lake Phalon into the city, with air-cocks, stop-gates, waste and blow-off pipes, caps, and with one hundred fire-hydrants, with connecting

31 service-pipes and stop-gates, so that said works will be complete and ready for use to supply consumers when the necessary connections of service-pipes are made. The more particular manner of the construction of such works, and the materials to be used, are set forth in certain specifications which are hereto annexed, and hereby referred to and made a part hereof. And the said party of the second part, for and in consideration of said covenants and agreements of said party of the first part, to be by him kept and performed, doth covenant and agree to and with said party of the first part, that for the erection and completion of said works, and furnishing the materials therefor, it will pay the said party of the first part, his heirs and assigns therefor, the sum of four hundred and twenty-nine thousand dollars, of which sum it will

pay said party of the first part two hundred thousand dollars in the first-mortgage bonds of said company, and two hundred and twenty-nine thousand dollars in the paid-up stock of said company. That the whole issue of said mortgage-bonds shall not exceed the sum of two hundred thousand dollars, and shall run twenty years, with interest at the rate of eight per cent. per annum, payable semi-annually, on the 10th day of January and July of each year, in the city of New York, the principal and interest of said bonds to be secured by a trust deed, executed to such persons or corporation as said Gilfillan may indicate, upon all the franchises, rights, and property of said company, acquired or to be acquired. And the said party of the second part hereby further cov-
32 enants and agrees to pay the said sum in bonds and stock as aforesaid at such time or times, and in such sums as said Gilfillan shall request.

"And said Gilfillan does hereby covenant and agree that he will pay all the expenses necessary to be incurred by said company for printing books, stationery, printing, engineering, and the office expenses, including salaries, until the completion of such works as aforesaid.

"In witness whereof the parties to these presents have hereunto set their hands and affixed their seals the day and year first above written in duplicate, said company signing by its president and secretary.

"In presence of—

"Specifications referred to in the above contract.

"1. To be laid a 16-inch main from station O, on the bank of Lake Phalon, along the surveyed line of such main to and across the city limits of Saint Paul, and along Herkimer avenue and Jefferson street to Grove street, to 10th street, and along 10th street to John street, and along John street to 7th street, and along 7th street to Jackson street, a distance of twenty-one thousand feet, more or less.

"2. To be laid from said Jackson street along 7th street to Fort street, and along Fort street to Ramsey street, a distance of six thousand feet, more or less, a 16-inch or a 12-inch pipe, or a part of each, as said Gilfillan shall determine.

"3d. To be laid 25,640 of six-inch pipe in various streets of said city.

33 "4th. To be laid 16,000 feet of four-inch pipe in the various streets of said city.

"5th. To be laid enough of three-inch pipe to connect one hundred fire-hydrants with the street-mains laid.

"6th. All of said pipe except that laid and to be laid from station 74 to Lake Phalon to be of the kind known as the wrought-iron and cement.

"7th. All of said pipes to be provided with the necessary stop-cocks when laid in the said city, and to average not less than one stop-gate to each 1,000 feet of pipe, said stop-gates to be protected by boxes with cast-iron covers, and said pipes to be provided with proper caps and blow-off pipes when needed.

"8th. There shall be made such works of excavation, trenching, embankments at and between the lakes above Lake Phalon as shall, in the opinion of the engineer in charge of the works, bring in to said Lake Phalon, in addition to the ordinary amount flowing therein, a greater quantity of water than can be carried off by such 16-inch main pipe leading from said lake.

"9th. There shall built at said Lake Phalon, where said 16-inch pipe starts, a bulk-head, extending into said lake to a point where the water is at least 20 feet deep, and with pipes or flumes laid therein to conduct the water from the end of said bulk-head into the gate-house, said inlet pipes or flumes to be provided with screens through which all water is to pass going to said gate-house.

34 "10th. The gate-house to be built so as to have double-doors, and the sides thereof to be double and filled with saw-dust or charcoal.

"11th. All streams over which the main pipe passes, and also all ravines or gutters down which water runs, to be spanned by stone culverts or bridges, upon which said pipes shall be laid and securely covered, said bridges to be laid in mortar and substantially built.

"12th. All trenches in which street-mains are laid in the city shall be at least six feet deep, and the trenches wherein is to be laid pipe of over six inches in size shall be six and a half feet deep.

"13th. The fire-hydrants to be one hundred in number and of an improved pattern, to be set up and protected in a substantial manner against frost. In each hydrant service-pipe there shall be placed a stop-gate.

"14th. The title to all the materials purchased for the work shall immediately vest in said water company.

"15th. Should it be deemed expedient, after more thorough surveys or examinations, or during the progress of the works, to alter the alignment of the works and grades, or modify the details or change the dimensions of any of the parts thereof, or to extend the same, it shall involve no question of damages; but the cost of said changes, modifications, or extensions shall be equitably adjusted between the parties, taking the contract as a basis for the values; and in case of disagreement such difference shall be settled by some third party, mutually agreed upon, or each party may choose a suitable referee; and the two thus chosen may choose an umpire, and the decision of the three shall

35 be final.

"In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has hereunto affixed its corporate seal, and caused the same to be attested by its president and secretary.

"C. D. GILFILLAN.
"JAMES GILFILLAN,
President.
"OSCAR STEPHENSON,
Secretary.

[CORPORATE SEAL.]

"In presence of—
"J. V. D. HEARD.
"LYMAN C. DAYTON."

And thereupon, without any other or further evidence, the plaintiff rested his case.

And thereupon the defendant, by its counsel, moved the court to direct the jury to return a verdict for defendant without requiring the defendant to enter upon a defence, upon the ground that the negligence, if any proved as the cause of the injury to plaintiff, was the negligence of the servants or employés of said contractor, and not of defendant nor any of its servants and employés; which motion the court then and there denied, and said: "This action is brought upon the principle which is settled at least in the federal courts, that where a person (company or corporation included) is engaged in a work, in the ordinary doing of which

a nuisance necessarily accrues, the person is liable for any injury that may result to third parties from carelessness or negligence, though the work may be done by a contractor;" and although the plaintiff
36 might have sustained an action against the city of Saint Paul, it is his right to seek his remedy against the party who created the nuisance. And to which ruling and decision of the court the defendant, by its counsel, then and there excepted.

And thereupon the defendant, to maintain the issues upon its part, gave evidence tending to show that the injury mentioned in the complaint was not caused by any neglect or misconduct of the persons employed on said work or having charge thereof, but was caused by the reckless and negligent driving of the plaintiff and the person with him in the buggy.

And thereupon defendant rested its case; and both parties having closed their case, the defendant then and there requested the court to charge the jury:

I. That, under the evidence in the case, they must find a verdict for defendant.

Which charge the court refused, and the defendant then and there, by its counsel, excepted to such decision and refusal.

And the defendant, by its counsel, then and there further requested the court to charge the jury:

II. That if the injury complained of was caused solely by the negligence or misconduct in the manner of doing the work of the employés of the contractor, then defendant is entitled to a verdict.

Which charge the court refused, and the defendant, by its coun-
37 sel, then and there excepted to such decision and refusal.

And the defendant, by its counsel, then and there further requested the court to charge the jury:

III. That if the presence in the street of the embankment, excavation machinery, and implements rendered it unsafe to travel the street with teams, and if the plaintiff, or the person driving him, saw, or with the use of ordinary prudence could have seen, such unsafe condition of the street, and notwithstanding chose to travel thereon, he or they did so at their own risk of injury from such unsafe condition, and if plaintiff, under such circumstances, was injured in consequence of such unsafe condition, he cannot recover for such injury.

Which charge, as requested, the court refused, but gave the same, qualified by adding thereto the words: Provided the jury are satisfied that the necessary care and caution was exercised by defendant. And the court further said, in reference to this instruction which is asked, that the defendant, by its charter, as well as by an ordinance of the city, was authorized to prosecute this work. It was a public improvement necessary to be done, and though the streets were more or less obstructed in digging trenches and operating a steam-drill, still the public must yield the enjoyment of a free and unobstructed passage for such reasonble time as might be required to perfect the work. The defendant, how-
ever, cannot relieve itself from the duty of exercising care and
38 diligence for the protection of the public because the improvement was a necessity.

To which refusal to charge, as requested, and to the said qualification thereof, defendant, by its counsel, then and there excepted.

And thereupon the plaintiff, by his counsel, requested the court to charge the jury that—

I. If the defendant, in constructing its works, unnecessarily ob-

structed Saint Peter street between Ninth and Eighth streets, so that it was not possible for plaintiff to turn and escape the danger from the engine; and if, after the noise from the engine, and at that place the way left for the passage of carriages was so narrow that the only way out was by the engine, the plaintiff is not charg'able with negligence, unless he knew or might have known, in the exercise of ordinary care, that the state of things above indicated existed.

Which charge the court then and there gave to the jury, and to which charge and every part thereof the defendant, by its counsel, then and excepted.

And the court thereupon, at the request of the plaintiff, further charged the jury—

II. That, if the defendant was using in the work steam-machinery and gunpowder, it was the duty of the defendant to have warned the plaintiff of the facts; and this duty was still more imperative upon defendant if it had, in addition to using this machinery and powder, also so obstructed the street as to increase the dangers to passers
39 in case the machinery was put in motion while said passers were among said obstructions, and further said, it is no argument against the prosecution of this work that it is a hazardous undertaking, and requires the use of dangerous implements and material in its prosecution, but the duty of the defendant to exercise extraordinary precaution was increased thereby.

To which charge and every part thereof the defendant, by its counsel, then and there excepted.

And the court thereupon, at the request of the plaintiff, charged the the jury that—

III. If, when the plaintiff arrived at the crossing of Ninth and Saint Peter street—provided he came down Ninth to Saint Peter—there was no warning or notices of defendant's operations given, and if the engine was quiet and not in motion, and the way of the street was open sufficiently for the passage of the carriage, the plaintiff had the right to enter upon said street, and he had the right to presume that that state of things would continue until he had passed beyond danger, and he committed no negligence in so doing.

To which charge and every part thereof, the defendant, by its counsel, then and there excepted.

And the court thereupon, at the request of the plaintiff, charged the jury that—

IV. If the persons in charge of the work saw the plaintiff coming down Saint Peter street, between 9th and 8th, in his carriage, it was their duty to refrain from all acts calculated to frighten his horse until he had passed by, and if the persons in charge of the work saw
40 the plaintiff coming along this narrow way, and, if they, after seeing him, caused the machinery to be set in motion, either the drill or boiler, and thereby made an alarming noise, and produced this casualty, it was such negligence as will make the defendant liable in this action, provided the defendant did no negligent act which concurred in producing the result; and the court further said that the plaintiff—the work being a lawful undertaking—must satisfy you that there was reasonable care and prudence on his part, as well as negligence on the part of the defendant, to which charge and every part thereof, the defendant, by its counsel, then and there excepted.

And the court of its own motion, also charged the jury, as follows:

"If you are satisfied that, at the time of, and preceeding the injury, the person engaged in doing the work, and having charge thereof,

used the care and precaution to prevent injury to others which ordinarily-prudent persons would use under like circumstances, why, then, the plaintiff cannot recover; or if you are satisfied that the plaintiff did not use all the care to avoid danger or injury which ordinarily-prudent persons would use under like circumstances, and his neglect to use such care contributed, in any degree, to bring the injury on himself, then defendant is entitled to a verdict; or if you believe that there was culpable negligence on the part of the plaintiff as well as on the part of the defendant, the defendant should have a verdict."

And thereupon the jury retired to deliberate on their verdict,
41 and afterwards came into court and rendered a verdict in favor plaintiff and against defendant, for the sum of twenty-two hundred and fifty dollars.

And now the counsel for defendant having prayed that this its bill of exceptions should be allowed and signed, and the same having been examined and found to be true, it is, at the request of defendant, hereby allowed, signed, and sealed.

RENSSELAER R. NELSON, [SEAL.]
District Judge.

And, afterwards, to wit, on the 20th day of February, A. D. 1871, on motion of plaintiff's attorney, and due notice to defendant's attorneys, the plaintiff's costs by him in and about his suit in this behalf expended, were duly taxed by the clerk of said court at the sum of sixty-six dollars and seventy-four cents, and bill of costs filed.

And, afterwards, to wit, on the 20th day of February, A. D. 1871, judgment was duly entered upon said verdict, in the words and figures following, viz:

United States circuit court, district of Minnesota.

EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

This cause being on the calendar for the October term of said court, 1870, and the same having been tried at said term before a jury,
42 who, on the 21st day of October, 1870, at said term, found a verdict for the plaintiff for the sum of two thousand two hundred and fifty dollars, and a stay of proceedings having been, on motion of defendant, granted, and the time of such stay having expired, and the clerk having computed the interest on said verdict to the present term, the same amounting to $52.50, and having also taxed the plaintiff's costs at the sum of sixty-six dollars and seventy-four cents—

Thereupon, upon motion of plaintiff's attorney, it is considered and adjudged by the court that the plaintiff do have and recover of and from the defendant the sum of twenty-three hundred two and fifty one-hundredths dollars, the amount of said verdict and interest aforesaid, besides his costs and disbursements by him in and about his suit in this behalf expended, taxed at sixty-six dollars and seventy-four cents, and that the plaintiff have execution therefor.

Judgment record signed this 20th day of February, A. D. 1871.
H. E. MANN, *Clerk.*

And afterwards, to wit, on the twenty-fifth day of February, *the de-*

fendant A. D. 1870, on application of said defendant, by his said attorneys, a writ of error was duly allowed by the Honorable R. R. Nelson, one of the judges of said court; which said allowance is in the words and figures following, to wit:

Circuit court of the United States for the district of Minnesota.

43 EDWARD B. WARE
vs.
THE SAINT PAUL WATER COMPANY.

And now the above-named defendant, after a final judgment entered in this cause, comes and shows to the court that the matter in dispute exceeds the sum of $2,000, and thereupon claims a writ of error from the said judgment to the Supreme Court of the United States, next to be holden at Washington, on the first Monday of December next; and the same is accordingly allowed, and the plaintiff in error is ordered to serve the usual citation according to law.

R. R. NELSON,
Dist. Judge.

ST. PAUL, *Feb'y* 25, 1871.

And, on the same day, the said defendant filed in the clerk's office of said court its bond, in the sum of five thousand dollars, for the prosecution of said writ of error and the payment of such judgment, if not reversed, and all damages and costs; which bond was duly approved by the Honorable Rensselaer R. Nelson, one of the judges of said court.

44 Circuit court of the United States of America for the district of Minnesota, ss:

I, H. E. Mann, clerk of the said circuit court for the district of Minnesota, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing is a full, true, and complete transcript of the records, process, pleadings, orders, bill of exceptions, final judgment, and all other proceedings in said cause, as appears from the original records and files of said court. And I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith the original citation, together with the proof of the service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of the said court, at Saint Paul, in the district aforesaid, this thirty-first day of August, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the United States the ninety-sixth.

[SEAL.] H. E. MANN, *Clerk.*

U. S. circuit court, district of Minnesota. Edward B. Ware vs. The Saint Paul Water Co. Writ of error & return.

(Indorsement on cover:) No. 428. The St. Paul Water Company, plaintiff in error, vs. Edward B. Ware. Minnesota C. C. U. S. Filed 28 November, 1871.

SUPREME COURT

OF THE

UNITED STATES.

ST. PAUL WATER COMPANY,

PLAINTIFF IN ERROR,

vs.

EDWARD B. WARE.

DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ALLIS, GILFILLAN & WILLIAMS,

Attorneys for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

THE ST. PAUL WATER COMPANY—Plaintiff in Error.

vs.

EDWARD B. WARE—Defendant in Error.

ABSTRACT OF CASE

The defendant in error brought suit below, for an injury to his person, alleged to have been brought about by reason of an excavation caused to be made by the plaintiff in error, through one of the streets of St. Paul, in constructing its works, and by the negligent conduct of the persons engaged in making the excavation, in their management of a steam engine and drill used in excavating, by means of which, as he alleges, his horse was frightened, overturned the carriage in which he was riding, and injured him.

His complaint sets forth, among other things, an ordi-

nance of the city of St. Paul, in the nature of a contract between it and the plaintiff in error, which contains the following provision:

"Sec. 6. The said Water Company agrees to protect all persons against damages by reason of excavations made by them in the said city, in laying pipes, and to keep the said excavations properly guarded by day and night, and to become responsible for all damages which may occur by reason of the neglect of their employees in the premises, and that the streets and highways in said city shall not be unnecessarily obstructed or incumbered in laying said pipes."

On the trial the defendant in error gave evidence that the contractor of the plaintiff in error, for the purpose of laying its pipes, made an excavation for a considerable distance along the street in question (St. Peter street,) such excavation with the embankment caused in making it, taking up the greater part of the width of the street, leaving, however, on one side, a pass wide enough for the passage of carriages; that the persons engaged in the work used for the purpose of excavating, a steam engine and drill, that the defendant in error was riding in a carriage down the pass towards the engine and drill, which at the time were not in operation; that just before he reached them, the persons in charge of the engine and drill, suddenly, (either negligently or wilfully) started the engine and drill. And one of them, (either negligently or wilfully) ran in front of defendant's horse, at the same time throwing up his hands; that the horse was thereby frightened, overturned the carriage and caused the injury complained of.

The defendant also proved that the work was being done for plaintiff by a contractor under a written contract, put in

evidence, a copy of which is in the bill of exceptions, and that the men engaged in doing the work were in the employ of such contractor. The written contract shows that the contractor was to construct the entire works of the plaintiff according to certain specifications, and that in the conduct of the work, the employment of workmen and in his control over them he was entirely independent of the plaintiff.

The plaintiff gave evidence which tended to show that the injury was caused by the negligence of the defendant.

The errors complained of arose upon the charge of the court and its refusals to give certain instructions requested by plaintiff.

Such errors are:

First.

In refusing to charge as requested by plaintiff (page 15, printed record.)

"That if the injury complained of was caused solely by the negligence or misconduct, in the manner of doing the work, of the employees of the contractor, then defendant is entitled to a verdict."

Second.

In charging as requested by defendants, (page 16, printed record), that

"If the persons in charge of the work saw the plaintiff coming down St. Peter street, between 9th and 8th, in his carriage, it was their duty to refrain from all acts calculated to frighten his horse until he had passed by, and if the persons in charge of the work saw the plaintiff coming along this narrow way, and if they, after seeing him caused the machinery to be set in motion, either the drill or boiler and

thereby made an alarming noise, and produced this casualty, it was such negligence as will make the defendant liable in this action, provided, the plaintiff did no negligent act which concurred in producing this result."

To this the court added:

"The plaintiff—the work being a lawful undertaking—must satisfy you that there was reasonable care and prudence on his part, as well as negligence on the part of defendant."

Third.

In adding to the following instruction requested by plaintiff in error, (page 15, printed record,)

"That if the presence in the street of the embankment, excavation and machinery, and implements, rendered it unsafe to travel the street with teams, and if the plaintiff or the person driving him, saw, or with the use of ordinary prudence, could have seen, such unsafe condition of the street, and notwithstanding, chose to travel thereon, he or they did so at their own risk of injury from such unsafe condition, and if plaintiff under such circumstances, was injured in consequence of such unsafe condition, he cannot recover for such injury."

This qualification,

"Provided, the jury are satisfied that the necessary care and caution was exercised by the defendant."

Fourth.

In charging on request of defendant in error, (page 16, printed record,)

"If, when plaintiff arrived at the crossing of Ninth and St. Peter streets—provided he came down Ninth to St.

Peter—there was no warning or notice of defendants' operations given, and if the engine was quiet and not in motion, and the way of the street was open sufficiently for the carriage, the plaintiff had a right to enter upon the said street, and he had the right to presume that that state of things would continue until he had passed beyond danger, and he committed no negligence in so doing."

BRIEF.

I.

The court below in its instructions to the jury, and in its refusals to instruct in the specified errors "First" and "Second," proceeded upon the theory, either, that under the contract between the plaintiff and its contractor, in evidence, the persons employed by the contractor to do the work, were the servants of the plaintiff, and the plaintiff therefore liable for their misconduct or negligence; or that having caused the work to be done, it is liable for such misconduct or negligence, though the relation of master and servants did not exist between it and the persons doing the work.

II.

The legal relation of master and servants did not exist between the plaintiff and the persons in charge of the machinery and doing the work. They were in the employ of the contractor. He was exercising an independent employment, and was their superior.

Shearman & Redfield on negligence. Sec. 76 & 77.
Forsyth vs. Hooper, 11 *Allen*, 419.
Pack vs. The Mayor &c., 8 *N. Y.*, 222.
Kelly vs. The Mayor &c., 11 *ib.*, 432.
Painter vs. Pittsburg, 46 *Penn. St.*, 213.

III.

A party is not liable for the misconduct or negligent acts of the employees of one to whom he lets a job of work to be done, by contract.

Hilliard vs. Richardson, 3 *Gray*, 349.

Blake vs. Ferris, 5 *N. Y.*, 48.

Reedie vs. London & N. W. R. R. Co., 4 *Exch.*, 244.

Callahan vs. Burlington R. R. Co., 23 *Iowa*, 562.

Chicago City vs. Robbins, 2 *Black.*, 418.

The court below based its instruction and refusal upon the authority of Chicago *vs.* Robbins. But that case decides only, that where one causes a nuisance to be created, he is liable for any damage resulting from the existence of the nuisance.

IV.

The plaintiff was engaged in a lawful undertaking. If its excavations were permitted to become unnecessarily dangerous, they became nuisances, and for any damage resulting from such unnecessarily dangerous condition, plaintiff would be liable. But the court below in its refusal to instruct and its instruction, (errors "First" and "Second,") did not proceed on that rule, but distinctly on the proposition that plaintiff was liable for injuries caused by the misconduct, negligent or willful, of the persons employed by the contractor to do the work. No reference is made to the condition of the work, dangerous or safe, but only to the collateral acts of the contractor's employees while doing it.

V.

The ordinance pleaded, does not affect the rights of the parties.

First. It was a contract between the city and the plain-

riff, and one not a party to it could derive no rights under it. It was intended solely for the indemnity of the city.

Second. The plaintiff, under the ordinance, did not agree to become responsible for the misconduct of the persons doing the work, but only for damages "*by reason of excavations,*" and "*to keep such excavations properly guarded,*" and to become responsible for all damages which might occur, "*by reason of the neglect of their employees in the premises;*" that is, by reason of the neglect of its employees to keep its excavations properly guarded. The object of the provision was to bind the plaintiff to do, in respect to the public streets, what, as between the city and the public, would be, primarily the duty of the city to do. The only change it made between the city and the plaintiff, was to give to the city a contract-right to hold the plaintiff for any damages it might be compelled to pay, by reason of the existence of the excavations in the street.

In Blake *vs.* Ferris, 5 N. Y., 48, there was a contract between the city and the defendant broader in its terms, than that in the case at bar, and it was there held that however beneficial it might be to the city, it could not enure to the benefit of the plaintiff in that action, nor strengthen his right to recover against the defendant.

VI.

The instructions as to what acts of defendant would constitute negligence were erroneous.

Error "Third."

The plaintiff requested the court to charge in effect, that if the defendant saw or with the use of reasonable prudence might have seen the unsafe condition of the street, and yet chose to pass along it, he assumed the risk incident to such unsafe condition.

For the defendant to persist in passing along the street, under such circumstances was in law, so far as concerned danger of injury from the condition of the street, negligence on his part, whether such unsafe condition of the street was owing to plaintiff's negligence or not. The cause of such condition had nothing to do with the question of defendants' negligence. It would be just as negligent in him, in case the condition of the street existed from the negligence or misconduct of the plaintiff as if it existed, notwithstanding the utmost care on its part. It was error, therefore, in the court to add to this instruction the qualification "Provided, the jury are satisfied that the necessary care and caution were exercised by defendants," which makes the question of negligence depend, not on defendants' knowledge of the condition of the street, but on the cause of such condition.

Error "Fourth."

This was also error. For the defendant may have known that the engine was there; what it was there for; and how it was worked; that the person using it habitually started and stopped it without giving any warning or notice, he may have had reason to believe that before he reached it the engine might be set in motion.

This instruction is also equivalent to a charge that as a matter of law, it there was room for him to pass, and the engine should remain quiet, it was prudent in him to attempt the passage, conceding that there was room for his carriage, and that he had reason to believe that the engine would remain stopped, till he passed, still it was for the jury to say whether it was prudent in him to drive along the pass.

ALLIS, GILFILLAN & WILLIAMS,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE ST. PAUL WATER COMPANY, Plaintiff in Error,

vs.

EDWARD B. WARE, Defendant in Error.

ARGUMENT FOR DEFENDANT IN ERROR.

M. LAMPREY,
Counsel for Deft. in Error.

SUPREME COURT OF THE UNITED STATES.

THE ST. PAUL WATER COMPANY,
Plaintiff in Error,
vs.
EDWARD B. WARE,
Defendant in Error.

ABSTRACT OF THE CASE.

The abstract of the plaintiff in error is deficient in its statement of the ordinance. Besides section 6, there is section 11, (p. 7, printed record) which provides, "the said company in making excavations * * * shall not unnecessarily obstruct said streets."

We controvert the abstract in its statement of the substance of the bill of exceptions as to the circumstances attending the casualty.

It appears by the bill of exceptions, (pp. 11 and 12) that the excavation extended along St. Peter Street, from its intersection with Eighth Street to a point at or near its intersection with Ninth Street, and occupied the greater part of the width of St. Peter Street, leaving for carriages on the east side of the street a pass wide enough to admit driving a buggy through, but not wide enough to turn a buggy in. The steam engine and drill stood at the edge of the excavation and a few feet above the point where Eighth and St. Peter Streets intersect. The defendant in error turned into St. Peter Street from Ninth or Tenth Street, and drove down along said pass on the east side of St. Peter Street towards Eighth Street. The engine and drill were not put in operation until he had driven within nine or ten feet of them, nor was there any notice at the point where he turned into St. Peter Street, or at any other point, of the existence of said engine or machinery, or of any intention to put the same into operation, nor were there any barricades any where on St. Peter Street. When the plaintiff was thus proceeding along the pass near the embankment, and when there was no room for him to turn his carriage, and when he came within ten feet of the engine, the persons in charge suddenly put it and the drill in operation, causing a loud and alarming noise.

ARGUMENT.

When the plaintiff rested, the defendant asked the Court to direct the jury "to return a verdict for the defendant, without requiring the defendant to enter upon a defence, upon the ground that the negligence, if any, found as the cause of injury to plaintiff, was the negligence of the servants and employees of said contractor, and not of the defendant or any of its servants and employees." (P. 14, printed transcript.)

The Court committed no error in denying this motion.

I.

The effect of section six of the ordinance, which is both an agreement with the public and a law, is to make the company liable, when injury results from negligence of an employee, whether such employee is a contractor or workman. The company agrees to protect all persons against damages, by means of excavations; to keep the excavations properly guarded; to become responsible for all damages; and not to unnecessarily obstruct the streets. (Sects six and eleven, pp. 6, 7, printed transcript.) It cannot rid itself from the primary liability imposed by this ordinance, by letting the work to a contractor. The liability exists, no matter how the work is done. The contractor is an employee of the company within the meaning of this section.

This alone is a sufficient answer to the exceptions in the record, based upon the testimony that this work was being done by a contractor.

The case of *Storrs vs. the City of Utica*, 17 *N. Y.*, 104, is in point, and the reasoning of the Court, on pp. 108, 9, seems particularly applicable to this case. *Blake vs. Ferris*, 5 *N. Y*, 48, is reviewed, and the doctrine that the city is not liable for injuries caused by negligence in the improvement of streets, because it has employed a contractor to do the work, is distinctly overruled. The expression in *Blake vs. Ferris*, (pp. 51, 52,) that a permission, similar in its terms to the ordinance pleaded in the case at bar, is only for the benefit of the city, and does not strengthen the right of the individual to recover, is a mere *dictum*, loosely taken for granted. That question does not seem to have been argued in the case. Besides, the persons who did the work in question, in that case, did it under a permit from the city authorities. Between them and the city this might well have been claimed to be merely a contract benefiting no one but the parties who made it. But in the case at bar, the Water Company proceeded under a law which imposed upon it the very liability which we seek to enforce.

II.

The Circuit Court was correct in its charge (pp. 14, 15, printed record) that "this action is brought upon the principle which is settled, at least in the federal courts, that when a person, (company or corporation, included) is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury that may result to third parties from carelessness or negligence, though the work may be done by a contractor, and although the plaintiff might have sustained an action against the city of St. Paul, it is his right to seek his remedy against the party who created the nuisance."

Chicago City vs. Robbins, 2 *Black*, 418.
Robbins vs. Chicago City, 4 *Wallace*, 657.

The obstructions on St. Peter Street were manifestly a nuisance. The work was a lawful undertaking, unlawfully performed. The ordinance made it lawful for the company to excavate the street, but it also (sect. 6) required the company to keep its work guarded day and night, and also (sect. 11, p. 7, printed record) prohibited the company from unnecessarily obstructing the street. If the company violated these provisions of law, it became a trespasser *ab initio* upon the street, and its work necessarily a nuisance. Whether the company did this work by contractors or day laborers, its liability is the same in such a case as this.

The author of the nuisance is directly liable to the person injured or is liable over to the corporation.

Wilford v. Holbrook, 9 *Allen*, 17.
Wood v. Mears, 12 *Ind.*, 515.
Bull v. Armstrong, 10 *Ind.*, 181.
Congreve v. Smith, 18 *N. Y.*, 79, 84.
Littleton v Richardson, 32 *N. H.*, 59.
Clark v. Fry, 8 *Ohio*, 359.
Bush v. Johnson, 23, *Pa. Stat. R.*, 209.

This liability exists independently of the ordinance. If the ordinance is laid altogether out of the case, the right of action of the plaintiff still exists by virtue of this principle.

III.

The defendant, after the case was rested on both sides, asked the Court to charge the jury, (p. 15, printed record.)

"1. That under the evidence in the case, they must find a verdict for defendant.

"2. That if the injury complained of was caused solely by the negligence or misconduct in the manner of doing the work of the employees of the contractor, then the defendant is entitled to a verdict." The Court was right in refusing so to charge.

The defendant also requested the Court to charge the jury, (p. 15, printed record,) "that if the presence in the street of the embankment, excavation, machinery and implements, rendered it unsafe to travel the street with teams, and if the plaintiff or the person driving him saw, or with the use of ordinary prudence could have seen such unsafe condition of the street, and notwithstanding choose to travel thereon, he or they did so at their own risk of injury from such unsafe condition; and if plaintiff under such circumstances, was injured in consequence of such unsafe condition, he cannot recover for such injury. Which charge as requested the Court, refused to give, but gave the same qualified by adding thereto the words, 'provided that the jury are satisfied that the necessary care and caution was exercised by the defendant; and the Court further said in reference to this instruction, that the defendant, as well by its charter as by ordinance of the city, was authorized to prosecute this work. It was a public improvement necessary to be done, and though the streets were more or less obstructed in digging trenches and operating a steam drill, still the public must yield a free and unobstructed passage for such reasonable time as might be required to perfect the work. The defendant cannot, however, relieve itself from the duty of exercising care and diligence for the protection of the public, because the improvement was a necessity."

The Court was correct in its qualifications of this request, not only for the reason stated in the charge, but because the casualty did not happen *solely* by reason of the obstructed condition of the streets; but, as the record shows, was contributed to by putting the steam machinery in operation, by the noise of which the horse was frightened. When the plaintiff came to the street he found a pass left by defendant wide enough for the passage of carriages; there were no barricades, notices or warnings whatever to advise him that this pass would become unsafe, or that the engine had been or was to be put in operation: it was not in operation when he entered the street: the pass left for carriages was so narrow that once in, plaintiff could not turn: the engine was not started

until he had come to within ten feet of it: until it was started the plaintiff was safe: the workmen might have seen, in fact the record shows that they did see him coming down the street. Plaintiff had the right to take for granted that the engine which was silent when he, thus seen by the workmen, entered upon this pass left there for carriages by the defendant, would not be started until he had passed.

IV.

The Court, at plaintiff's request, charged the jury (p. 16, printed record,)

"1. If the defendant in constructing its works unnecessarily obstructed St. Peter Street, between Eighth and Ninth Streets, so that it was not possible for plaintiff to turn and escape the danger from the engine; and if after the noise from the engine, and at that place the way left for the passage of carriages was so narrow that the only way out was by the engine, the plaintiff is not chargeable with negligence, unless he knew or might have known in the exercise of ordinary care that the state of things above indicated existed."

"2. That, if the defendant was using in the work steam machinery and gunpowder, it was the duty of the defendant to have warned the plaintiff of the facts; and this duty was still more imperative upon defendant if it had, in addition to using this machinery and powder, also so obstructed the street as to increase the danger to passers in case the machinery was put in motion while said passers were among said obstructions; and further said, it is no argument against the prosecution of this work that it is a hazardous undertaking, and requires the use of dangerous implements and material in its prosecution, but the duty of the defendant to exercise extraordinary precaution was increased thereby."

"3. If, when the plaintiff arrived at the crossing of Ninth and Saint Peter Street—provided he came down Ninth to Saint Peter—there was no warning or notice of defendant's operations given, and if the engine was quiet and not in motion, and the way of the street was open sufficiently for the passage of the carriage, the plaintiff had the right to enter upon said street, and he had the right to presume that that state of things would continue until he had passed beyond danger, and he committed no negligence in so doing."

This instruction is the one to which the plaintiff in error applies its fourth assignment of errors. This instruction is to be taken in connection with the rest of the charge, and it merely says that, in a case like this, where a street is left open for carriages, and no warning or notice is given that there is to be blasting or drilling by steam, the citizen has the right to enter the way which the company invited him to enter by leaving it open; and that under such circumstances the company shall not by starting machinery change the situation of the passer from that of safety to peril. The company was bound to keep its engine quiet. The proposition advanced by the plaintiff in error would absolve the company from all obligations to use any care whatever.

"4. If the persons in charge of the work saw the plaintiff coming down Saint Peter Street, between 9th and 8th, in his carriage, it was their duty to refrain from all acts calculated to frighten his horse until he had passed by, and if the persons in charge of the work saw the plaintiff coming along this narrow way, and, if they, after seeing him, caused the machinery to be set in motion, either the drill or boiler, and thereby made an alarming noise, and produced this casualty, it was such negligence as will make the defendant liable in this action, provided the

defendant did no negligent act which concurred in producing the result; and the Court further said that the plaintiff—the work being a lawful undertaking—must satisfy you that there was reasonable care and prudence on his part, as well as negligence on the part of the defendant."

And the Court of its own motion, also charged the jury, as follows:

"If you are satisfied that, at the time of, and preceding the injury, the person engaged in doing the work, and having charge thereof, used the care and precaution to prevent injury to others which ordinarily-prudent persons would use under like circumstance, why, then, the plaintiff cannot recover; or if you are satisfied that the plaintiff did not use all the care to avoid danger or injury which ordinarily-prudent persons would use under like circumstances, and his neglect to use such care contributed, in any degree, to bring the injury on himself, then defendant is entitled to a verdict; or if you believe that there was culpable negligence on the part of the plaintiff as well as on the part of the defendant, the defendant should have a verdict."

These instructions are a correct statement of the relative obligations and rights of these parties under the circumstances of this case. The jury were by the first request of the plaintiff directed to find upon the question, whether the street was unnecessarily obstructed by the work. If it was, the defendant was the creator of a nuisance, and became liable for injuries produced or contributed to by this nuisance, provided there was no negligence on the part of the plaintiff. And upon this question of contributory negligence by the plaintiff, the language of the Court in its last instruction to the jury, was peculiarly explicit and exact. In this instruction the Court went to the extreme limit in favor of the defendant, upon the doctrine of the contributory negligence which will absolve the defendant from liability.

The judgment should be affirmed.

M. LAMPREY,
Counsel for Defendant in Error.

Judge Davis Judge Davis
Denied April 7
16- 577.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~445.~~ 208

ABRAHAM WALBRUN AND DANIEL WALBRUN, PLAINTIFFS IN ERROR,

vs.

JAMES C. BABBITT, ASSIGNEE OF MARKS MENDELSON, BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED DECEMBER 1, 1871.

DEC 1. 1871

SUPREME COURT OF THE UNITED STATES.

No. 445.

ABRAHAM WALBRUN AND DANIEL WALBRUN, PLAINTIFFS IN ERROR,

vs.

JAMES C. BABBITT, ASSIGNEE OF MARKS MENDELSON, BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

INDEX.

	Original.	Print.
Petition for recovery of property	2	1
Filing of plea of defendant	4	2
Plea	4	3
Filing similiter	5	3
Similiter	5	3
Jury impaneled	6	4
Verdict	7	5
Injunction dissolved	8	5
Bill of exceptions filed	8	5
Judgment	8	5
Bill of exceptions signed	8	6
Deposition of W. Summerfield filed	9	6
Jury impaneled	9	6
Verdict	10	6
Judgment	11	7
Bill of objections	11	7
Adjudication of bankrupt	11	8
Assignment of bankrupt's effects	13	9
Schedule A, No. 3	17	10
Oath to Schedule A	19	10
Schedule B, No. 2	20	10
B, No. 3	21	11
B, No. 5	22	12
Oath to Schedule B	23	12
Amended petition and schedule filed	24	12

	Original.	Print.
Amended Schedule B	25	13
Oath to amended Schedule B	26	13
Defendant's objections	27	14
Deposition of Marks Mendelson	28	15
Plaintiffs' objections	35	18
Deposition of H. Summerfield	37	19
Defendant's objections	46	24
Deposition of H. Summerfield	47	24
Deposition of W. Summerfield	51	26
Objections of defendant	51	27
Defendant's instructions	52	27
Instructions refused	53	28
Second instructions of defendants	53	28
Instructions by the court to jury	55	29
Exceptions of defendant	58	30
Bond for costs	60	31
Certificate of clerk	60	31

PROCEEDINGS IN CIRCUIT COURT.

Assignment of errors filed	61	32
Assignment of errors	61	32
Joinder in error	62	33
Stipulation in regard to transcript filed	63	33
Hearing of case submitted and taken under advisement	63	33
Agreement	64	34
Deposition of Lewis Ritter	64	34
Final judgment	69	36
Motion for rehearing filed	70	37
rehearing	70	37
rehearing overruled	71	38
Death of Ritter one of plaintiffs in error suggested	71	38
Order of supersedeas	71	38
Bond of appeal	72	39
Clerk's certificate	75	39
Writ of error	76	40
Citation	78	40

1 UNITED STATES OF AMERICA,
Districts of Missouri, sct:

Pleas before the honorable the circuit court of the United States for the districts of Missouri. April term, 1871.

JAMES C. BABBITT, ASSIGNEE, &C.,
vs.
ABRAM WALBRUN, DANIEL WALBRUN, AND Lewis Ritter.

Be it remembered that, on the twentieth day of March, A. D. eighteen hundred and seventy-one, there was filed in the circuit court of the United States for the districts of Missouri, a transcript of proceedings had in the district court of the United States for the western district of Missouri, in the above-entitled case; which transcript is in the words and figures following, to wit:

TRANSCRIPT FROM DIST. COURT.

In the district court of the United States for the western district of Missouri. March 12th, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABBITT, ASSIGNEE,
vs.
ABRAM WALBRUN, DANIEL WALBRUN, AND Lewis Ritter. } Petition for the recovery of property.

2 Upon the petition of James C. Babbitt, assignee herein, against Walbrun, Brother & Co., for the recovery of property, it is ordered that a summons issue herein against the said Walbrun, Brother & Co., returnable at chambers on the second Monday, the 14th day of June, A. D. 1869.

In the district court of the United States for the western district of Missouri. March T., 1869.

JAMES C. BABBITT, ASSIGNEE OF THE ESTATE of Marks Mendelson, pl'ff,
vs.
ABRAHAM WALBURN, DANIEL WALBURN, & Lewis Bitter, trading and doing business as merchants under the name and style of Walburn, Bro. & Co., defendants.

James C. Babbitt, assignee of the estate of Marks Mendelson, bankrupt, by his attorneys, Lay & Belch, complains of Abraham Walburn, Daniel Walburn, & Lewis Ritter, who are partners doing business under the name and style of Walburn, Bro. & Co., defendants in this suit, who

have been summoned to answer the plaintiff in an action of trover, for that the plaintiff & defendants, citizen' of Missouri and within the jurisdiction of this court; and the said Marks Mendelson having been, on the 24th day of December, 1868, adjudged a bankrupt under the provision of act of Congress to provide for uniform system of bankruptcy; and the said James C. Babbitt was, on the 20th day of January, A. D. 1869, appointed assignee of the estate of said bankrupt; and on the day last aforesaid, the register in bankruptcy conveyed by deed of assignment all the goods, chattels, personal and real property of
3 said bankrupt to the said James C. Babbitt, including the goods, wares, and personal property hereinafter mentioned; which deed is here in court shown. And the said James C. Babbitt, as assignee, was lawfully possessed as of property in right of said bankrupt, to wit:

Inventory of goods omitted, of great value, to wit, of the value of eight thousand dollars, and being so possessed thereof, he, the plaintiff, afterwards, to wit, on the day of , 186 , casually lost the said personal property, goods, wares, & merchandise specified herein out of his possession, and afterwards, to wit, on the day [and] year last aforesaid, came to the possession of the defendants by finding. Yet the defendants, well knowing the said goods, wares, merchandise, & personal property to be the property of this plaintiff, as assignee aforesaid, and of right belonging and appertaining to him, but contriving and fraudulently intending craftily and subtilely to deceive and defraud the plaintiff in this behalf, has not, as yet, delivered the said goods, wares, merchandise, and personally property to plaintiff, though often requested by him so to do, and afterwards, to wit, on the 5th day of February, 1869, converted and disposed of the said goods, wares, merchandise, and personal property to their own use, to the plaintiff's damage of ten thousand dollars; and therefore he brings suit, &c.

LAY & BELCH,
Att'ys for Pl'ft.

(Endorsed:) Case 572. James C. Babbitt, assignee, pl'ff, vs. Walbrun, Bro. & Co., def't. In the matter of Marks Mendelson, bankrupt. Petition for recovery of property. Filed March 8th, 1869, at 10 o'clock a. m. Adams Peabody, clerk.

4 *Filing of plea of defendants.*

In the district court of the United States for the western district of Missouri.

AT CHAMBERS, *Friday, June 4th*, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABBITT, ASSIGNEE,
vs.
ABRAM WALBRUN, DANIEL WALBRUN, & Lewis Ritter. } Petition for recovery of property.

And now come the defendants, Abram Walbrun, Daniel Walbrun, and Lewis Ritter, by their attorney, Edmund T. Allen, and file a plea herein.

Plea.

District court of the United States, western district of Missouri.

JAMES C. BABBITT, ASSIGNEE, &c., *vs.* ABRAHAM WALBURN, DANIEL WALBURN, & Lewis Ritter.

And the said defendants, by Edmund T. Allen, their attorney, come and defend the wrong and injury, when, &c., and say that they are not, nor is either of them, guilty of the said supposed grievances in plaintiff's declaration laid to their charge, or any or either or any part thereof, in manner and form as the said plaintiff hath in said declaration complained against them; and of this they put themselves upon the country, &c.

EDMUND T. ALLEN,
Defendants' Attorney.

5 (Endorsed:) Case No. 572. District court of United States, western district of Missouri. James C. Babbitt, assignee, vs. Abraham Walburn, Daniel Walburn, & Lewis Ritter. Defendants' plea. Filed June 4th, 1869. Adams Peabody, clerk. Edmund T. Allen, defendant's attorney.

Filing similiter.

In the district court of the United States for the western district of Missouri.

THURSDAY, *July* 1*st*, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABBITT, ASSIGNEE, *vs.* ABRAM WALBRUN, DANIEL WALBRUN, AND Lewis Ritter. } Petition for recovery of property.

And now comes the plaintiff, James C. Babbitt, assignee herein, by himself and by his attorneys, Lay & Belch, and hereupon said plaintiff files a similiter herein; whereupon this cause is continued to the next September term of this court.

Similiter.

District court of the United States, western district of Missouri.

JAMES C. BABBITT, ASSIGNEE OF MARK Mendelson, bankrupt, plaintiff, *vs.* WALBURN, WALBURN & RITTER, DEFENDants.

And the plaintiff, as to the plea of said defendants in the above cause,

and whereof they have put themselves upon the country, doth the like.

LAY & BELCH,
Att'ys for Pl'ff.

6 (Endorsed:) Case No. 572. Jas. C. Babbitt, assignee, vs. Walbrun, Bro. & Co. Similiter. Filed July 1st, 1869. Adams Peabody, clerk.

Jury empannelled.

In the district court of the United States for the western district of Missouri. September term.

SEPTEMBER 22ND, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABITT, ASSIGNEE,
vs.
ABRAHAM WALBRUN, DANIEL WALBRUN, & Lewis Ritter, composing the firm of Walbrun, Bro. & Co. } Petition for recovery of property.

And now comes the plaintiff, James C. Babbitt, assignee herein, by his attorneys, Lay & Belch, and also come the said defendants, by their attorney, Edmund T. Allen; and hereupon come a jury, to wit, Jonas Hinds, J. W. Black, Benjamin F. Joslin, Thomas Quinn, Charles P. Walker, Joseph Metzler, J. E. Goldsworthy, N. D. Stark, Joseph Sappington, Edmond Luisenbard, Thomas M. Garland, and J. S. Hume, twelve good and lawful men, duly elected, tried, and sworn well and truly to try and true deliverance make between James C. Babbitt, assignee of the estate of Marks Mendelson, plaintiff, and Walbrun, Brother & Co., defendants; whereupon evidence is heard and the cause progresses.

THURSDAY, *September 23rd*, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

7 JAMES C. BABBITT, ASSIGNEE,
vs.
ABRAHAM WALBRUN, DANIEL WALbrun, & Lewis Ritter, composing firm of Walbrun, Bro. & Co. } Petition for recovery of property.

And now comes the plaintiff J. C. Babbitt, assignee herein, by his attorneys, Lay and Belch, and also come the defendants, by their attorney, Edmund T. Allen, and hereupon come the jury, to wit, Jonas Hinds, J. W. Black, Benjamin F. Joslin, Thomas Quinn, Charles P. Walker, Joseph Metzler, J. E. Goldsworthy, N. D. Stark, Joseph Sappington, Edmond Luisenbard, Thomas M. Garland, and J. S. Hume, and, hereupon, additional evidence is heard and the cause further progresses.

Verdict.

FRIDAY, *September 24th*, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABBITT, ASSIGNEE, *vs.* ABRAHAM WALBRUN, DANIEL WALBRUN, & Lewis Ritter, composing firm of Walbrun, Bro. & Co. } Petition for recovery of property.

And now comes the plaintiff, James C. Babbitt, assignee herein, by his attorneys, Lay and Belch, and also come the said defendants, by their attorney, Edmund T. Allen, and hereupon come the jury, to-wit, Jonas Hind, J. W. Black, Benjamin F. Joslin, Thomas Quinn, Charles P. Walker, Joseph Metzler, J. E. Goldsworthy, N. D. Stark, Joseph Sappington, Edmond Luisenbard, Thomas M. Garland, and J. S. Hume. Whereupon said cause is submitted thereto, and thereupon the jurors aforesaid upon their oaths aforesaid, do say: "We, the jury, find
8 for the plaintiff, and assess his damages at forty-five hundred and ninety-three $\frac{55}{100}$ dollars, ($4,593.55.)"

Injunction dissolved.

And now, upon the motion of the defendants' attorney, the court here orders that the injunction herein, against the defendants aforesaid, be, and the same is hereby, dissolved.

Bill of exceptions filed.

And now said defendants file their bill of exceptions herein.

Judgment.

FRIDAY, *November 26th*, 1869.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABBITT, ASSIGNEE, *vs.* ABRAHAM WALBRUN, DANIEL WALBRUN & Lewis Ritter. } Petition for recovery of property.

And now come the parties hereto, by their respective attorneys, and hereupon the court adjudges against the said defendants, Abraham Walbrun, Daniel Walbrun, and Lewis Ritter, composing the firm of Walbrun, Brother and Company.

It is therefore considered and adjudged, by the court here, that the plaintiff, James C. Babbitt, assignee of the estate of Marks Mendelson, recover of and against said defendants, Abraham Walbrun, Daniel Walbrun, and Lewis Ritter, composing the firm of Walbrun, Brother and Company the sum of forty-five hundred and ninety-three $\frac{55}{100}$ dollars, the damages aforesaid, in form by the jury aforesaid assessed, together

with his costs and charges in and about his suit in this behalf expended, and that he have execution therefor.

Bill of exceptions signed.

The bill of exceptions herein is now here signed by the judge.

9 *Deposition of W. Summerfield filed.*

In the United States district court for the western district of Missouri.
September term, 1870.

MONDAY, *September 26th*, 1870.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

JAMES C. BABBITT, ASSIGNEE, *vs.* ABRAHAM WALBRUN, DANIEL WALBRUN & Lewis Ritter. } Petition for recovery of property.

The deposition of William Summerfield is now here filed in behalf of plaintiff.

Jury empannelled.

And now comes James C. Babbitt, assignee, plaintiff herein, by his attorneys, Messrs. Lay and Belch and Myers, and also come the said defendants, Abraham Walbrun, Daniel Walbrun, and Lewis Ritter, by their attorneys, Messrs. Allen and Ewing and Smith, and hereupon come a jury, to wit, Isaac Askew, James M. Bonifield, Isaac Dwight, Walker Tebbs, John Bard, James H. Todd, Sidney N. Ingram, John Dougherty, Julius M. Bourke, John S. McFarland, George Britton, and Foster Mitchel, twelve good and lawful men, duly elected, tried, and sworn, well and truly, to try and true deliverance make between James C. Babbitt, assignee, plaintiff herein, and Abraham Walbrun, Daniel Walbrun, and Lewis Ritter, defendants. And now the evidence is heard, arguments are entered upon, and, for want of time, it is ordered that further proceedings be continued till to-morrow morning.

In the United States district court for the western district of Missouri

WEDNESDAY, *September 28th*, 1870.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

10 JAMES C. BABBITT, ASSIGNEE, *vs.* ABRAHAM WALBRUN, DANIEL WALbrun, and Lewis Ritter. } Petition for recovery of property.

Verdict.

And now come the parties hereto, by their respective attorneys, and also come the jury sworn in the case, to wit, Isaac Askew, James M. Bonafield, Isaac Dwight, Walker Tebbs, John Bard, James H. Todd,

Sidney N. Ingram, John Dougherty, Julius M. Bourke, John S. McFarland, George Britton, and Foster Mitchell, and hereupon having received the instructions of the court, the jury aforesaid, upon their oath aforesaid, do say: "We the jury find for the plaintiff, and assess the damages at five thousand seven hundred & thirty-five dollars and fifty cents, ($5,735.50.")

And now said defendants file their bill of exceptions herein.

Verdict.

We the jurors find for the plaintiff and assess the damage at five thousand seven hundred and thirty-five dollars and fifty cents, ($5,735.50.)

FOSTER MITCHELL,
Foreman.

(Endorsed:) Case 572. In the matter of Marks Mendelson, bankrupt. James C. Babbitt, assignee, vs. Abraham Walbrun et al. Verdict. Sept. term, 1870. Filed Sept. 28th, 1870. Adams Peabody, clerk.

In the United States district court for the western district of Missouri.

SATURDAY, *October 1st*, 1870.

IN THE MATTER OF MARKS MENDELSON. Involuntary bankruptcy. } Case 572.

11 JAMES C. BABBITT, ASSIGNEE, *vs.* ABRAHAM WALBRUN, DANIEL WALbrun, and Lewis Ritter. } Petition for recovery of property.

Judgment.

And now, at this day, come the parties hereto, by their respective attorneys, and hereupon the court adjudged against the said defendants, Abraham Walbrun, Daniel Walbrun, and Lewis Ritter, the sum of five thousand seven hundred and thirty-five dollars and fifty cents.

It is therefore considered, ordered, and adjudge', by the court here, that the said plaintiff, James C. Babbitt, assignee of the estate of Marks Mendelson, recover of and against the said defendants, Abraham Walbrun, Daniel Walbrun, and Lewis Ritter, composing the firm of Walbrun, Brother & Company, the said sum of five thousand seven hundred and thirty-five dollars and fifty cents, the damages in form by the jury assessed, together with his costs and charges in and about his suit in this behalf expended, and that he have have thereof execution.

And the bill of exceptions is now here signed by the judge.

Bill of objections.

United States district court, western district of Missouri.

JAMES C. BABBITT, ASSIGNEE OF MARKS MENdelson, bankrupt, plaintiff, *vs.* ABRAHAM MALBRUN ET AL., DEFENDANTS. } In bankruptcy.

Adjudication of bankrupt.

Be it remembered that, on the 26th day of September, A. D. 1870, the above entitled cause came on to be heard upon the pleadings,
12 proofs, and exhibits in said cause, and upon the trial thereof the plaintiff introduced the following evidence, to wit:

AT CHAMBERS, *Thursday, December 24th*, 1868.

IN THE MATTER OF MARKS MENDELSON, bankrupt. } In bankruptcy.

WESTERN DISTRICT OF MISSOURI, *ss:*

This cause came on to be heard and the petitioning creditors appeared, by their attorneys, Lay & Belch, and also appeared the said Marks Mendelson, in person, by his attorneys, Ewing & Smith, but the said Marks Mendelson made no denial of the allegations of bankruptcy and no opposition to the prayer of the petition herein.

And thereupon, and upon consideration of the proofs in said cause, it is found that the facts set forth in said petition are true, and it is therefore adjudged that the said Marks Mendelson became a bankrupt within the true intent and meaning of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2nd, 1867, before the filing of the said petition, and he is therefore declared and adjudged a bankrupt accordingly.

And it is further ordered that the said bankrupt shall, within five days after the date of this order, make and deliver or transmit by mail, postpaid, to the marshal, as messenger, a schedule of his creditors and inventory of his estate, in the form, and verified in the manner, required of the petitioning debtor by the said act.

And it is further ordered that this case be referred to Milo Blair, one of the registers in bankruptcy of this court, to make adjudication thereon, and to take such other preceedings therein as are required by
13 said act. And further that the said Marks Mendelson shall, on or before the 15th day of January, A. D. 1860, at 10 o'clock, a. m., file with said register a schedule of his creditors and inventory of his said estate, duly verified, and that he attend before said register, at the city of Jefferson, county of Cole, on said day, and thenceforth as said register may direct, to submit to such orders as may be made by said register, or by this court, relating to his said bankruptcy.

And further that, until otherwise ordered by the court, the said register shall act upon the matters arising in this case, at his office, on High street, at the city of Jefferson, at such times as he may fix for that purpose.

And it is further ordered that the notice required herein by said act be published in the Warrensburg Standard, a newspaper published at Warrensburg, county of Johnson, and State of Missouri, in accordance with the rules adopted by this court governing proceedings in bankruptcy.

And it is further ordered that a duly-certified copy of this adjudication be served upon the said Marks Mendelson according to law:

First. Showing that on the 24th day of December, A. D. 1868, Mark Mendelson was duly adjudicated a bankrupt by the United States district court for the western district of Missouri.

Second. A duly certified copy of the assignment from a register in bankruptcy of said court to said assignee, as follows, to wit:

Assignment of bankrupt's effects.

In the district court of the United States for the western district of Missouri.

IN THE MATTER OF MARKS MENDELSON, bankrupt. } In bankruptcy.

14 WESTERN DISTRICT OF MISSOURI, *ss:*

Know all men by these presents, that James C. Babbitt, of the city of Jefferson, in the county of Cole, and the State of Missouri, in said district, has been duly appointed assignee in said matter. Now, therefore, I, Milo Blair, register in bankruptcy, by virtue of the authority vested in me by the 14th section of an act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to said James C. Babbitt, assignee as aforesaid, all the estate, real and personal, of the said Marks Mendelson, bankrupt aforesaid, including all the property, of whatever kind, of which he is possessed, or in which he was interested, or entitled to have on the 14th day of December, A. D. 1868, with all his deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of the assignment by the provisions of said fourteenth section of said act.

To have and to hold all the foregoing premises to the said James C. Babbitt & his heirs forever, in trust, nevertheless, for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said Milo Blair, have hereunto set my hand this 20th day of January, A. D. 1869.

MILO BLAIR,
Register in Bankruptcy.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Adams Peabody, clerk of the United States district court for the western district of Missouri, hereby certify that the foregoing is
15 a true copy of the assignment of the estate and effects of Marks Mendelson, bankrupt, made by the register to whom the petition of said bankrupt was referred for adjudication in bankrutcy; that the said Milo Blair is a register in bankruptcy within and for the western district of Missouri, duly appointed and qualified, and that as such register the said Milo Blair was duly authorized to make such assignment.

In witness whereof I hereunto subscribe my name and affix the seal of said court this 25th day of January, A. D. 1869.

ADAMS PEABODY,
Clerk of District Court for said District.

Third. The schedules filed by said Marks Mendelson in said court as follows, to wit:

16

17 SCHEDULE A No. 3.

SCHEDUDE A.—*Creditors whose claims are unsecured.*

When the name or residence of any creditor is unknown, the fact must be stated, and, also, the name, residence, and occupation of the last holder known to the petitioner. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property; the nature of each debt and demand, whether founded on written security, obligation, contract, or otherwise, and, also, the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued.

Ledger or voucher.	Names of creditors.	Residence and occupation.	Amount.	When and where contracted.	Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as copartner or joint-contractor, with any other person; and, if so, with whom.
	Suss, Obermeyer & Co.	St. Louis, merchants	1,077 40	St. Louis, 1866.....	Note for merchandise.
	L. Hellman & Bro.....	do. do.	362 85	do. 1867.....	do. do.
	M. Eisenstadt & Co....	do. do.	192 39	do. 1866 & 7	Account do.
	Schlesinger & Co.....	do. do.	615 65	do. 1868.....	Note do.
	S. Strauss & Co.....	do. do.	375 58	do. 1868.....	Account do.
	Kramer & Loth.....	do. do.	2,363 50	do. 1868.....	Note for merchandise.
	Barr, Duncan & Co....	do. do.	1,664 94	do. 1868.....	Notes " do. do.
	Obermeyer & Co.....	do. do.	228 75	do. 1868.....	Note do.
	J. Meyling	do. do.	207 35	do. 1867.....	Account do.
	Appleton, Noyes & Co.	do. do.	1,334 31	do. 1867 & 8	Notes and account do.
	Huzza & Gilmore.....	do. do.	48 25	do. 1868.....	Account do.
	J. Weil, Bro. & Co.....	do. do.	399 22	do. 1868.....	Note do.
	M. Spiro.....	do. do.	72 80	do. do.	Account do.
	American Powder Co. } F. G. Godard, agent }	do. do.	44 35	do. do.	Account do.
	Ed. Popper.....	do. do.	200 00	Credits not known..	Note do.
			9,187 34		
18	Bro't forward.....	.....	9,187 34		
	Southwestern Insurance Co.....	St. Louis, Mo.....	75 00	St. Louis, July 8th, 1868.....	Note for insurance.
	National Insurance Co.	Hannibal, Mo.....	50 00	Hannibal, 1868....	do. do.

MARKS MENDELSON,
Petitioner.

Oath to Schedule A.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

On this 24th day of December, A. D. 1868, before me personally came Marks Mendelson, the person mentioned in, and who subscribed to the foregoing petition, and Schedule marked A, respectively, and who being by me first duly sworn, did declare the said schedule to be a statement of all his debts, etc., in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

ADAMS PEABODY,
U. S. Com'r Dist's of Mo.

20 SCHEDULE B, No. 2.—*Personal property.*

Petition by debtor. R. P. Studley & Co., printers, St. Louis.]

	Dollars. Cts.
1 watch and chain.....	20 00
1 lot of wearing apparel of self & family.....	75 00

	Dollars.	Cts.
2 kegs of blasting powder	8	00
1 " " rifle do	7	70
1 lot of shot	9	00
1 desk	2	00
One show-case	12	00
1 shot-gun	15	00
2 revolvers	15	00
1 bedstead	10	00
1 bureau	10	00
1 wash-stand	4	00
1 spring mattrass	1	00
1 bedstead	5	00
1 table, $6; 6 chairs, $3; 1 rocker, 2.50	11	50
3 bed mattrasses	2	00
1 safe, $6; 1 cooking & 1 heating stove, $30	36	00
Beds & bedding, $30; books, $6; looking-glass, $3	39	00
Table-ware & cloths	10	00

MARK MENDELSON,
Petitioner.

21 SCHEDULE No. 3.—*Choses in action.*

Petition by debtor. R. P. Studley & Co., printers, St. Louis.]

					Dollars.	Cts.
Joe Ellis	acc't	Carter's place near	Vicksburg,	Miss	325	00
Oliver O'Niel	"	Videlia, La., ac.	"	"	148	60
Addison Herris	"	Carter's place, near	"	"	106	00
Bradford Wethers	"	Ellen's "	"	"	378	25
W. J. Robbins	"	P. O. Oburn Station	"	"	51	88
Willis Washington	"	Dr. Phitzugh's	"	"	63	15
Mrs. E. C. Washington	"	Warreton road	"	"	273	94
" Lize Evens	"	near Baldwin's Sta.	"	"	71	18
P. W. Holloway	"	Vicksburg		"	95	60
J. Beaverley		"		"	10	00
Fox, watchmaker		"		"	10	00
Solomon Wilkins		"		"	24	00
Lewis Phillips, on Baszuisky's place			"	"	20	00
W'm George			V'burg,	"	16	80
Thomas Kennedy			"	"	6	50
J. Davis			"	"	6	00
John Bitterman			"	"	12	50
J. Kruszki, New Orleans, La					26	85
Jessy Armstrong, on Davis Bend, Miss					11	25
Dr. Dick		V'burg, "			31	00
Mrs. Fottz		" "			15	05
Mrs. Gibson		" "			17	50
Miss Stith		" "			2	50
John O'Brien, for Stanley,		" "			27	50
Charles Shelby					30	50
S. Herman, Port Gibson,					439	68
					$2,231	23

MARKS MENDELSON,
Petitioner.

Petition by debtor.]

22 SCHEDULE B No. 5.—*A particular statement of the property claimed as excepted from the operation of said act, by the provisions of the 14th section thereof, giving each article of property and its valuation, and, if any portion of it is real estate, its location, description, and present use.*

(N. B.—The property claimed to be exempt under the laws of any State is to be described separately from the rest, and reference given to the statute of said State creating the exemption.)

PROPERTY EXEMPT BY LAW.

	Valuation. Dollars.	Cents.
Bedstead, $10; bureau, $10; wash-stand, $4	24	00
1 spring mattrass, $1; 1 bedstead, $5; 3 old mattress', $2	8	00
1 table, $6; 6 chairs, $3; rocker, $2.50	11	50
1 safe, $6; 1 cooking stove & heating stove, $30	36	00
Beds & bedding, $30; books, $6; glass, $3.00	39	00
Table-ware & cloths	10	00
1 watch & chain	20	00
Wearing apparel, & self & family, & all other personal property contained in Schedule B, No. 2	75	00

MARKS MENDELSON,
Petitioner.

23 *Oath to Schedule B.*

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

On this 24th day of December, A. D. 1868, before me personally came Marks Mendelson, the person mentioned in and who subscribed to the foregoing petition, and schedule marked B, respectively, and who being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

ADAMS PEABODY,
U. S. Com'r, Dist's of Mo.

(Indorsed:) Case no 572. District court of the United States. Western district of Missouri. In the matter of Marks Mendelson, bankrupt. Ewing & Smith, attorneys for petitioner. Filed Dec. 24th, 1868, at 11.30 o'clock a. m. Adams Peabody, clerk.

24 *Amended pet'n & schedule filed.*

United States district court, western district of Missouri.

IN THE MATTER OF MARKS MENDELSON, bankrupt.

To the Hon. Arnold Krekel, judge U. S. dist. court, western district of Missouri.

Marks Mendelson, the above-named bankrupt, by leave of court first

had and obtained, comes and files this his amended petition and schedule of articles which were overlooked & unintentionally omitted in his original petition.

MARKS MENDELSON.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Marks Mendelson, the petitioning-debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information and belief; and I do further make oath that I am a citizen of the United States of America, and that I will bear true faith and allegiance to the same.

MARKS MENDELSON.

Subscribed and sworn to before me this 7th day of January, A. D. 1869.

ADAMS PEABODY,
U. S. Commissioner Dist's of Mo.

25 *Amended Schedule B.*

SCHEDULE B.—*Personal property.*

Petition by debtor. R. P. Studley & Co., printers, St. Louis.]

	Dollars.	Cts.
Lot fixed ammunition in store at Kingsville, Johnson Co., Mo.	10	00
2 clocks, $4; one infant's carriage, $20	24	00
1 music-box, $15; 5 coal-oil lamps, $5	20	00
1 axe, $1.25; 2 hatchets, $1	2	25
1 lot twine, 50 c'ts; 1 shoe-scraper, $1.50	2	00
200 feet blasting fuse	2	50
2 umbrellas, $2.50; 1 picture, $10	12	50
4 trunks, $12.00; 2 table-castors, $6	18	00
1 diamond ring, owned by my wife	50	00
1 pair earrings, $3.00; 1 seal, $2.50	5	50
	$146	75

MARKS MENDLESON,
Petitioner.

26 *Oath to amended schedule.*

Oath to Schedule B.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

On this 7th day of January, A. D. 1871, before me personally came Marks Mendelson, the person mentioned in and who subscribed to the foregoing petition, and schedule marked B, respectively, and who being by me first duly sworn, did declare the said schedule to be a statement of all his estate, both real and personal, in accordance with the act of

Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

ADAMS PEABODY,
U. S. Commissioner Dist's of Mo.

(Indorsed:) Case No. 572. District court of the United States, western district of Missouri. In the matter of Marks Mendelson, bankrupt. Schedule B. Amended petition. Ewing & Smith, attorneys for petitioner. Filed Janu'y 7th, 1869, at 9.30 o'clock a. m. Adams Peabody, clerk.

27 *Defendants' objections.*

To which last-named evidence defendants then and there objected as incompetent and irrelevant, which said objections the court overruled, to which action of said court defendants then and there excepted.

4th. The deposition of Marks Mendelson, taken in September, 1869, by defendants.

UNITED STATES OF AMERICA,
State of Missouri, County of Saint Louis, ss:

I certify that on the 6th, seventh, eighth, and ninth days of September, A. D. 1869, before me, the undersigned, C. O. Bishop, a notary public within and for the county of Saint Louis, and State of Missouri, at the office of E. T. Allen, esq., No. 305½ Olive street, in the city of Saint Louis and county aforesaid, between the usual hours of business, commencing on the seventh day of September, at three o'clock p. m., were produced and personally came Marks Mendelson and Joseph Franklin, witnesses on behalf of the defendants, to depose in a civil cause depending in the district court of the United States for the western district of Missouri, held at Jefferson City, in said district, on the common law side of said court, wherein James C. Babbitt, assignee of the estate of Marks Mendelson, bankrupt, is plaintiff, and Abraham Walbrun, Daniel Walbrun, and Lewis Ritter are defendants in an action of trover, and whose testimony is alleged to be material in said civil cause in behalf of the defendants.

At the hour named in the notice hereunto attached Marks Mendelson appeared before me at the place named therein, and refused to give his testimony in said cause until he had had an opportunity to con-
28 sult counsel and to consider whether he would testify or not.

At the suggestion of E. T. Allen, esq., counsel for defendants in the above-named cause, the taking of the testimony of said Mendelson, under said notice, was adjourned until nine o'clock a. m. of the eighth day of September, A. D. 1869. Thereupon at the request of said Allen, I, the said notary, issued the subpœna hereto annexed, addressed to Lucien Eaton, esq.; said Eaton failing to appear, the further taking of deposition under said notice was adjourned until nine o'clock tomorrow, the eighth day of September, A. D. 1869.

C. O. BISHOP,
Notary Public, Saint Louis Co., Mo.

Pursuant to adjournment, as above stated, on the eighth day of September, A. D. 1869, at nine o'clock a. m. of that day, I continued the taking of depositions under said notice, as follows, to wit:

Marks Mendelson, of lawful age, being produced, cautioned and duly sworn by me and examined on his oath, deposes and says as follows, to wit:

Deposition of M. Mendelson.

My name is Marks Mendelson. I am thirty-three years of age. I reside in the city of Saint Louis, Mo. I am in the furniture business in this city. In the fall of A. D. 1868, I was merchandizing in Kingsville, Mo. I sold my stock of merchandise to Herman Summerfield. He was living at that time in St. Louis. I wrote to him, making him a proposition to sell out to him. I did not tell him in that letter why I wanted to sell out to him. I am not positive. I think I wrote to him there was some business there he could make some money on, & to bring some money with him. This was in the latter part of October, or the first part of November. I think this was the first time I
29 had ever written to him. I had seen him about six weeks or two months before. I don't remember exactly. I know positively that I saw him in the spring. I am not certain I saw him after the spring.

Q. What is your impression about it?

A. I don't think I have seen him since the spring.

Q. About what day of the month did Summerfield come to Kingsville?

A. He came there about the beginning of November.

Q. State fully all the conversation you had with Summerfield about your stock of goods, and your reasons for selling out.

A. I told Mr. Summerfield when he came out that I can't make a living with my stock of goods in Kingsville, and that I would like to sell out the stock to him at what the stock was worth, if he sees he can make anything out of it. He asked me what I intended to do then in business. I told him that I intended to engage in the furniture or hardware business, or both together, and that I intended to rent me another store, which was building at the same time a few feet above my place of business, and which I could get fixed up to suit my business. We then took stock at what I thought the goods were worth, and then I sold him the goods at a reduction of twenty-five per cent. on what the stock amounted to, the goods being old stock and in bad condition. After he bought me out he told me that he don't believe that it would pay him to stay there in that business, because several days passed that he made no sale. Then he told me that he would go off in a certain place & see some parties which had money always on hand, and if he could sell the goods to them by making anything he would dispose of the goods and return to St. Louis. He left and returned after two or three days with
30 a gentleman, and introduced him to me as Mr. Ritter, from Chillicothe, of the firm of Walbrun, Brother & Co., and then he told me that he wanted to try and sell the stock to him. At the transactions which passed between them I was not present.

Q. Did you tell Summerfield anything as to your financial condition?

A. I did not.

Q. If any goods were sold, state whether these goods were deducted from the inventory in settling with Summerfield.

A. If any goods were sold they were not put on the inventory. The store was open while we were taking the inventory. People were coming and going out as usual. There were no questions asked by them about

my selling out that I remember. I talked about going into the furniture business before Summerfield come there. Several of my neighbors advised it, as there was a demand for it. One of my neighbors especially, named Robinson or Roberts, talked with me about it, as he was building a house with a store under it, and I was talking about taking it, and telling him how I wanted it fitted up for the furniture and hardware business. So far as I know, Summerfield had no reason to believe that I was insolvent, or unable to pay my debts, or knew anything about my business up to the time he returned to St. Louis. Summerfield paid me something like fifty-three hundred & some odd dollars. The money was in different denominations. I could not say how many of each. There were hundreds, fifties, & so on. He paid it to me in the store. I don't believe there was anybody in the store at the time. Persons were going in and out all the time, but I don't suppose that anybody noticed what we were doing. He paid the money some four or five or six days
31 before he went to Chil'icothe. He left the store in my charge when he went away. He told me he would see some parties with money, but he did not tell me where he was going. He did not say anything to me before going away about Walbrun, Brother & Co. I had never heard of them before. I did not know them. The store was kept open while Summerfield was away. I was there cutting clothes and fixing watches for persons who brought them in. There were no goods sold while Summerfield was gone. There was a full inventory of everything taken before Summerfield bought; everything measured, counted, & marked. I believe he took that inventory away with him. I had no talk with Ritter about the goods till after the sale to him. Ritter asked me what kind of business I intended to engage in. I told him I intended to go into furniture or hardware. He then advised me before I engaged in any other business there, to look at some other places on different roads, and see if I couldn't find a better place than Kingsville. I took his advice, and went with him after he had his goods shipped. I don't believe Ritter & Summerfield took another inventory of the goods. Summerfield told Ritter he had just had a letter from his wife. I brought the letter myself from the post-office while they were measuring the goods, and I heard Summerfield tell Ritter his wife was sick, and he must return home immediately. Summerfield told Ritter he couldn't stop to measure anything more, but if he should find anything missing according to the inventory, he would correct mistakes. I think Summerfield gave Ritter a copy of the inventory. I saw Ritter pay Summerfield the money in the store. It was done in my presence. I don't know what the amount was. I did not count it, and I did not hear them say what the amount was. Summerfield told me had made five per cent. on the transaction.

32 Not being able to complete the taking of said deposition, I adjourned the further taking of said deposition of Mark Mendelson until to morrow, the ninth day of September, A. D. 1869, then to be continued at the same place and between the same hours as in said notice specified.

C. O. BISHOP,
Notary Public, St. Louis Co., Mo.

Pursuant adjournment, as above stated, on the ninth day of September, A. D. 1869, I continued the taking of deposition under the said notice at the same place as follows, to wit:

Marks Mendelson, in continuance of his deposition, commenced yesterday, further deposes and says as follows, to wit:

The goods were packed up in boxes. I helped them pack them. They did not have boxes enough, and I went and got the boxes myself. Ritter paid for the boxes. The boxes were marked "Walbrun, Bro's & Co., Chilicothe, Mo., H. & St. Jo. R. R.," or something like that, and were carried to the depot the day that the money was paid over. I paid for the carting of them to the depot, and Mr. Ritter refunded the money to me. I believe it was about twenty-five cents a load. There were four or five loads, or something like that. The store was open during all the time the packing and carting was done. It was all done in the day time. Summerfield took the train east for St. Louis that very evening. Ritter left the same night about ten or half past ten, on the train going west. Up to the time the goods were sold to Ritter by Summerfield there had been but one man within two months in my store to ask me for money representing any of my creditors, and I paid him all he asked for. I owed his house some fifty-odd dollars, and I paid him
33 fifteen dollars on account. My credit was good in Kingsville up to the time of my sale to Summerfield, and of his sale to Ritter, and after that, too, the sale had no effect upon my credit there.

Q. When was the first time that you heard any question made in Kingsville by anybody, or doubt, as to your being insolvent or unable to pay your debts?

A. I never remember hearing anybody arguing that question or asking me about it.

Q. When did you first tell anybody in Kingsville that you were unable to pay your debts?

A. I don't believe I ever told anybody that.

Q. When was the first demand made on you on the part of your creditors that you were unable to meet?

A. It was about 8 or ten days after the sale of Summerfield to Ritter. I had been away from Kingsville and got back, a person representing the firm of Appleton, Noyes & Co., of St. Louis, presented their bill to me. Up to that time there had never, to my knowledge, been any talk in Kingsville as to my solvency. At the time I failed my indebtedness was between nine and ten thousand dollars. The goods bought by Walbrun, Brother & Co., of Summerfield, in the condition they then were in, were not worth over five thousand dollars.

Q. State whether or not you made the sale of your stock of goods to Herman Summerfield with a view to prevent your property coming to your assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of the bankrupt act.

A. No, sir; I did not.

34 Q. State whether or not you made the sale of your stock of goods to Herman Summerfield with intent to delay, defraud, or hinder your creditors?

A. I did not.

MARKS MENDELSON.

Sworn to and subscribed before me this ninth day of September, A. D. 1869.

[SEAL.]

C. O. BISHOP,
Notary Public, St. Louis Co., Mo.

UNITED STATES OF AMERICA,
State of Missouri, County of St. Louis, ss:

I, the said notary, further certify that the said Joseph Franklin and Marks Mendelson, before giving the foregoing depositions, were by me first severally & carefully examined, cautioned, and duly sworn to testify the whole truth touching the matter in controversy in said civil cause; that said depositions were, at the place and at the times hereinbefore mentioned, reduced to writing by me in the presence of said deponents, and by them severally signed in my presence, after having been carefully read over by me to said deponents. I further certify that the reason for taking said deposition was and is, and the fact was and is, that said deponents each live at the said city of Saint Louis, Mo., more than one hundred miles from Jefferson City, in the said western district of Missouri, where said civil cause is appointed by law to be tried; that the only attorney of the adverse party known to me was Lucien Eaton, esq., of St. Louis, and that the notice hereto annexed marked Exhibit "A," was by me served upon said Eaton, as appears by my return thereon; that no other notice was made out or given by me to
35 said Babbitt, the plaintiff, and adverse party, or his attorneys, to be present at the taking of said deposition, and to put interrogatories, if thought fit, because neither said plaintiff, nor any other attorney of said plaintiff, except said Eaton, was within one hundred miles of the place named in the caption where said deposition was taken, so as to enable notice to be given. I further certify that its being impracticable for me to deliver said deposition with my own hand into the court for which it is taken, I have retained the same for the purpose of being sealed up by me and speedily and safely transmitted by the United States mail to the said court for which it was taken, there to remain under my seal until there opened.

In testimony whereof I hereunto set my hand and affix*ed* my notarial seal, this ninth day of September, A. D. 1869.

[SEAL.]

C. O. BISHOP,
Notary Public, St. Louis Co., Mo.

[5-c't rev. stamp.]

(Endorsed:) Case No. 572. In the matter of Marks Mendelson, bankrupt. James C. Babbitt, assignee, vs. Walbrun, Brothers & Co. Deposition for defendants. Filed Sept. 14th, 1869, at 5 p. m. Adams Peabody, clerk.

Plaintiff's objections.

The plaintiff objected to the following part of said deposition:

"After he bought me out he told me that he don't believe that it would pay him to stay there in that business, because several days passed that he made no sale. Then he told me that he would go off in a certain place and see some parties which had money always on hand, and if he could sell the goods to them by making anything, he would dispose of the goods and return to St. Louis."

Which said objection the court sustained; to which action of
36 the court, defendants then and there excepted.

Plaintiffs also objected to the following part of said deposition:

"I had talked about going into the furniture business before Summerfield came there; several of my neighbors advised it, as there was a demand for it. One of my neighbors especially, named Robinson or

Roberts, talked with me about it, as he was building a house with a store under it, and I was talking about taking it, and telling him how I wanted it fitted up for the furniture and hardware business."

Which said objection the court sustained, to which action of the court defendants then and there duly excepted.

Defendants objected to the following part of said deposition, to wit:

"He left the store in my charge when he went away" as incompetent & irrelevant, which said objection the court overruled, and defendants then and there excepted to said action of the court.

The deposition of Joseph Franklin, in which appeared the following statement of a conversation had between himself and Marks Mendelson, in the city of St. Louis, on the seventh day of September, A. D. 1869, concerning the transaction between himself and Herman Summerfield, to wit:

"I, for personal information, asked Mr. Mendelson how he lost the money, how he came in the situation he was now; I had heard that he had lost this money. He said he had lost the money, and felt as badly about it as any body else, or something to that effect."

To which part of said deposition defendants then and there duly objected as irrelevant, incompetent, and immaterial which said objection the court overruled, and defendants then and there duly excepted to said action of the court.

37 The deposition of Herman Summerfield, taken Aug. 30th, 1869, at Friar's Point, Mississippi; *or* interrogatories.

Deposition of H. Summerfield.

Interrogatories to be propounded to Herman Summerfield, in the case of James C. Babbitt, assignee, &c., vs. Walbrun, Bro. & Co., defendants, now pending in the United States district court in and for the eastern district of Missouri.

STATE OF MISSISSIPPI, *Coahoma County:*

I, Geo. R. Alcorn, clerk of the circuit court, and ex-officio clerk of the chancery court of said county and State aforesaid, do hereby certify that on the 30th day of August, A. D. 1869, before me personally appeared at my office, in the town of Friar's Point and county aforesaid, were produced and came Herman Summerfield, witness on behalf of the defendant, to depose in a civil suit depending in the United States district court for the western district of Missouri, held at Jefferson City, in said district, on the common law side of said court, wherein James C. Babbitt, assignee of Marks Mendelson, is plaintiff, and Abraham Wilbrun, Daniel Wilbrun, and Lewis Ritter, are defendants, in an action of trover, and whose testimony is alledged to be material in said civil case, on behalf of the defendants; and the said Herman Summerfield, being of lawfull age and sound mind, and being by me first carefully examined, cautioned, and duly sworn to testify the truth, and nothing but the truth, relating to the controversy aforesaid, deposes and says:

1st int. State your residence, age, and occupation.

A. Friar's Point, Mississippi; 29 years old; furniture dealer.

2nd int. Where did you reside, and in what business were you engaged during the year 1868?

A. St. Louis; in furniture business, and trading generally.

38 3rd int. Did you know Marks Mendelson; and if so, where and when did you first meet him?

A. I did; met him first at Warrensburg, Missouri, in March or April, 1868.

4th int. State whether you had business transactions with Marks Mendelson during the year 1868; and if you did, state in detail what they were.

A. I bought a stock of goods from him in November, the early part thereof, in 1868, and paid cash for them. I bought the goods from Marks Mendelson, in Kingsville, Missouri. He sold them to me for 25% less than original costs; and some unsaleable articles he sold for less. I paid him between five thousand and five thousand five hundred dollars.

5th int. If you purchased any goods from Mendelson during the year 1868, state what goods; how you came to purchase them; what you paid for them, if anything.

A. I bought the entire stock of goods that Mendelson had in Kingsville. He wrote me a letter at St. Louis, to come and buy him out. As already stated, I paid him between five thousand and five thousand and five hundred dollars.

6th int. If in answer to previous questions you have stated that you purchased any goods from Marks Mendelson, in the year 1868, state what you did with those goods; to whom you sold them, if to any one; and state all you remember about the transaction.

A. I sold the goods to Walbrun, Bro's & Co., Chilicothe, Missouri. Immediately after buying the goods from Mendelson, I went to Chilicothe, Missouri, to see Walbrun Bro. & Co., and tried to sell the goods I had purchased to them, having had previous transactions with them.

39 I agreed to let them have the stock of goods at 20% below the original costs. They agreed to take them at that price, provided they liked the goods; and Lewis Ritter went with me to Kingsville to look at the goods. When he saw them he took the goods for Walbrun, Bro. & Co. upon the terms I agreed to let them have them for, and he paid me then and there, in Kingsville, between five thousand five hundred and six thousand dollars.

7th int. State, if you have not already done so, at what price you sold the goods above-mentioned.

A. As already stated, I sold them between five thousand five hundred and six thousand dollars.

8th int. State any conversation you may have had with Mendelson, if any, about the reasons why he sold his stock of goods?

A. Mendelson told me the reason why he wanted to sell out his stock, that he was not making a living; that there was too much competition; that he wanted to go into the hardware and furniture business; that he had been recommended by Lawyer "King and others, of Kingsville," to do so.

9th int. State, if you have not already done so, whether or not an inventory was taken of the goods you purchased from Mendelson.

A. Inventory was taken.

10th int. Produce any letter you may have received from either party to this suit, or from Mendelson, since January 1st, 1868.

A. I have no such letters in my possession to produce.

11th int. State, if you have not already done so, to whom you sold the goods you purchased from Mendelson, and at what price you sold them.

A. I sold the goods to Walbrun, Bro. & Co. at the price between five thousand five hundred and six thousand dollars.

12th int. State any and all conversation you may have had with the defendants in this action, as to your purchase of any goods from Mendelson.

40 A. When I went to Chilicothe, Missouri, to sell the goods I bought of Mendelson to Walbrun, Bro. & Co., I saw Daniel Walbrun & Lewis Ritter, of said firm of Walbrun, Bro. & Co. I told them that I had bought a stock of goods from Marks Mendelson, of Kingsville, Mo., at 25% below costs—the original costs—and some unsaleable articles for less. I showed them the inventory of the goods. I told them Mendelson's reasons for selling the goods was that he told me he could not make a living; that there was too much competition; that he wanted to go into the hardware and furniture business; that he had been recommended by Law. King and others, of Kingsville, to do so.

13th int. State any matter or thing which you have not already stated, with reference to your purchase of a stock of goods from Marks Mendelson, in December, 1868, and your subsequent sale of same goods to the defendants in this action.

A. I bought the stock of goods in November, 1868. We took the inventory of said goods in day-time. Persons were coming in and asking questions, what we were doing; reply that we were taking inventory of the goods. It was generally known in Kingsville that I had bought him out. The goods, after I had sold them to Walbrun, Bro. & Co., were boxed up in day-time, and there not being sufficient boxes in the store to box all the goods, Lewis Ritter procured some extra ones for that purpose. Said goods, after being boxed, were hauled down to the station for shipment in day-time.

EDMUND T. ALLEN,
Defendant's Attorney.

Cross-interrogatories to be propounded to Herman Summerfield, in a certain cause depending in the United States district court for
41 the western district of Missouri, wherein James C. Babbitt, assignee, &c., plaintiff, and Walbrun, Bro. & Co. defendants.

1st int. Where did you reside at the time you purchased a stock of goods from Marks Mendelson?

Ans. In St. Louis, Missouri.

2nd int. Where did Marks Mendleson reside at that time, and where did he do business?

Ans. Kingsville, Missouri.

3rd int. How long had you known Marks Mendelson before the said purchase of goods?

A. About March or April, 1868.

4th int. Are you related to him?

A. He and I married sisters.

5th int. What other business transactions had you with him prior to the purchase of the stock of goods?

A. None.

6th int. If you went to his place of business, when did you go? What induced you to go? And how long were you there before you purchased?

A. In the early part of November, 1868, Mendleson wrote to me to come; was there about a day.

7th int. Did you take an inventory of the goods? If so, who assisted, and how long were you in taking it? And did Mendelson continue to sell at retail whilst you were engaged in taking the inventory?

A. I did. Mendelson. Several days. He did continue to sell at retail while inventory was being taken.

8th int. How did you determine the value of the different articles embraced in the inventory?

A. He told me his mark, and we determined the value by the mark.

42 9th int. How much did the goods amount to, and did the purchase include the entire stock?

A. The purchase included the entire stock, and amounted to something over seven thousand dollars at the original costs.

10th int. How much did you pay Marks Mendelson for them, and how; if in cash, what kind of money, and the denomination of money, as nearly as you can now state; and where did you get the money to pay him?

A. I paid him between five thousand and five thousand and five hundred dollars. Paid him in money. Currency. In different size bills; don't know the size of the bills. It was my own money.

11th int. To whom did you sell the goods purchased from Mendelson, and terms and amounts received by you for goods?

A. I sold the goods to Walbrun, Bro & Co., at Chil'icothe, Mo. Terms, cash. And the amount received for the goods between five thousand five hundred and six thousand dollars.

12th int. How long after you made the purchase of Mendelson was it till you resold them, and when did you make the sale?

A. But a short time. I sold them between the 6th and 14th of November, 1868, I think.

13th int. Did you offer to sell the goods to other person or persons; and if to any, to whom, where, and when?

A. I offered to sell the goods only to Walbrun, Bro. & Co., and no one else; and I sold them between the 6th and 14th of Nov'r, 1868. They bargained for the goods—conditionally—in Chil'icothe, Mo., and when the goods were found to come up to my representation, one of the partners of said firm, Lewis Ritter, paid me for the goods, in Kingsville, Mo.

43 14th int. Did you make another inventory of the goods when you sold them; if so, who made that inventory; and was all the goods remeasured and weighed?

A. I did not; and the goods were not remeasured; were not reweighed.

15th int. In what business were you engaged *in* at the time you made the purchase, and where?

A. I was in the furniture trade; and trading generally in St. Louis, Mo.

16th int. How long had you been in business?

A. I commenced the furniture business in St. Louis in June, 1868. I had a partner by the name of Newman.

17th int. Of what did your stock in trade consist, and its value?

A. Consisted of furniture and household goods; and about two thousand dollars stock.

18th int. Where did you make your deposits, for and during the year preceding the purchase from Mendelson?

A. Never made any deposits.

19th int. To what amount were you assessed, and how much in cash & in land the year you made the purchase?

A. Was not assessed at all. I went into business after May, in said year 1868, and assessor did not call on me after that time.

20th int. What amount of income did you return to the assessor of internal revenue for the United States during the year of the purchase, and when did you make the return?

A. Did not make any, from the fact the assessor did not come around to assess me.

21st int. How long had you known the defendants in this suit before you purchased the goods from Mendelson; and when and where did you first become acquainted with them, or either of them?

44 A. I got acquainted with Daniel Walbrun & Lewis Ritter, of the firm of Walbrun, Bro. & Co., in Chil'icothe, Mo., some three years ago.

22nd int. With which member of the firm did you contract in making the sale to Walbrun, Bro. & Co.?

A. Daniel Walbrun & Lewis Ritter.

23rd int. After buying the goods from Mendelson, did you go immediately to Chillicothe, Mo., to see the defendants in this suit? What induced you to believe that you could make a sale of these goods to Walbrun, Bro. & Co.?

A. I did. They were doing a large business; had plenty of money, and having had previous transactions with them.

24th int. How long did you remain in Chillicothe, Mo., and when you returned to Kingsville, did any member of the firm of Walbrun, Bro. & Co. accompany you; and if so, who?

A. I remained a day or so. Lewis Ritter accompanied me there.

25th int. While you were taking an inventory of the goods, & while you were absent trying to effect a sale of the goods to the defendants, did you leave Mendelson in charge of the goods and permit him to sell the same at *at* retail; if so, what amount did he sell while you were taking the inventory, and what amount while you were absent at Chillicothe, Mo.?

A. I did. He sold small amounts; do not know the amount. While I was absent at Chillicothe he sold several dollars' worth.

26th int. What amount of capital did you have invested in business in 1868?

A. I had in furniture and trading business generally about eight thousand dollars.

27th int. From whom did you rent your business house in St. Louis, in 1868, and from whom your place of residence, and what rent

45 did you pay for each?

A. I don't know; have forgotten of whom I rented; we paid sixty dollars per month for the store-house, and thirty or thirty-five dollars per month for the rent of the house—(dwelling.)

28th int. What time did you quit business in St. Louis, day, month, year, as near as you can?

Ans. About the first of January, 1869.

29th int. To whom did you sell your stock in Saint Louis, when did sell, for what price, and on what terms?

Ans. Did not sell our stock. My partner took a part to Helena, Arkansas, and I sold the balance at retail, for cash. Don't know what amount it brought.

30th int. How long was it before you made the purchase from Mendelson, that you had seen or commuicated with Walbrun, Bro. & Co., or any member of that firm, and give the time when, and place where?

Ans. I saw them in May, 1868, at Chil'icothe, to wit, Lewis Ritter; not certain that Daniel Walbrun was there.

31st int. Did you carry all the money you paid to Mendelson with you, at the time you went up to Kingsville to make the purchase?

Ans. I did.

32nd int. Where was it that you paid Mendelson, and who was present at the time?

Ans. In his store-house in Kingsville, Missouri; don't remember that any one was present.

33rd int. What were your average cash receipts per day, or week, or month in 1868, up to time you bought these goods?

Ans. Do not remember.

34th. Did you keep books, showing the amount of your pur-
46 chases, sales, and cash received and on hand, in 1868; and if so, where are these books?

Ans. We kept books; don't know where the books are; I suppose they are in the hands of my partner, Newman; they were in his possession when I last saw them; said Newman swindled me out of everything, and we had a split up, and have not seen him since.

Interlineations and erasures made before signing.

H. SUMMERFIELD.

LAY & BELCH,
Att'ys for Plaintiff.

I, the said clerk of the circuit court, and ex-officio clerk of the chancery court, do certify that the foregoing deposition of Herman Summerfield was then and there reduced to writing by me, in presence of the deponent, and by him subscribed in my presence, after having so reduced to writing and read over to him. I further certify that the fees for taking said depositions, amounting to five dollars, were paid to me by the defendant, and that the same is just and reasonable for the same performed.

In testimony whereof I have hereunto set my hand and affixed my seal of office this the 30th day of August, 1869.

[SEAL.] GEO. N. ALCORN, *Cl'k.*

Defendants' objections.

The defendants objected the following part of the 7th cross-interrogatories and answer thereto, to wit:

"And did Mendelson continue to sell at retail whilst you were engaged in taking the inventory?"

"He did continue to sell at retail while inventory was being taken;" as irrelevant and incompetent, which said objection the court overruled, and defendants duly excepted then and there to such action of the court.

47 The defendants objected to each of the following cross-interrogatories in said deposition, as being incompetent and irrelevant, to wit, 16th, 17th, 18th, 19th, 20th, 25th, 26th, 27th, 28th, 29th, 33rd, & 34th, each of which said objections the court overruled, and defendants then and there duly excepted to said action of the court.

7th. The deposition of Herman Summerfield, taken on the twenty-fourth day of August, A. D. 1869, as follows, to wit:

Deposition of H. Summerfield.

UNITED STATES OF AMERICA,
Northern District of Mississippi, ss:

I certify that on the 24th day of August, A. D. 1869, before me, W. L. Stricklin, a commissioner of the United States court for the northern district of Mississippi aforesaid, between the usual hours of business, at my office in the town of Friar's Point, county of Coahoma, and State of Mississippi, was produced and personally come before me, Herman Summerfield, to me personally known, a witness on behalf of defendants, to

depose in a civil cause depending in the United States district court for the western district of Missouri, held at Jefferson City, in said district, on the common-law side of said court, wherein James C. Babbitt, assignee of Marks Mendelson is plaintiff and Abraham Walbrun, Daniel Walbrun, and Lewis Ritter are defendants, in an action of trover, and whose testimony is alleged to be material in said civil cause on behalf of defendants. And the said Herman Summerfield, being of lawful age and sound mind, and being by me first carefully examined, cautioned and duly sworn to testify the truth relating to the controversy aforesaid, depose and says:

I went to Kingsville, Missouri, in the early part of November, 1868. Before going there I received a letter from Marks Mendelson the latter part of October or first of November, 1868, requesting me to come to Kingsville to buy a stock of goods. The letter is lost or mislaid.

48 I became acquainted with Marks Mendelson in March or April, 1868. Mendelson and I married sisters, there being no other relation existing between us; I do not know when Mendelson married. I married the 25th of October, 1868, and Mendelson was already married at that time. I took an inventory of Mendelson's stock of goods, and he assisted me in so doing. His store was open at the time. Sometimes Dr. Pinkton, or some such name, Lawyer King, and his partner, and customers, whose names I do not remember, come in the store while we were taking an inventory. Mendelson told me that his reason for selling the stock of goods was that he wanted to change his business into the hardware and furniture business, there being too much competition in the dry-goods line, and there being none in the hardware and furniture line, he having been advised to do so by Lawyer King. I had no knowledge of Mendelson owing any debts at the time, and never suspected anything of the kind, from the fact that he made no secret of this selling out to me. I bought his stock of goods, and paid him upwards of five thousand dollars for the same. Mendelson deducted twenty-five per cent. off of cost prices in the sale to me. He also made a still greater deduction upon some old and unsaleable goods. I paid for the goods in currency. I went to Chillicothe, Missouri, after buying the goods; I think it was the next day. I saw Daniel Walbrun and Lewis Ritter, of the firm of Walbrun, Bro. & Co., of Chillicothe, Missouri. I was acquainted with this firm for several years previous, having dealt with them in hides, wool, &c. I showed Daniel Walbrun and Lewis Ritter the inventory of the goods I had bought of Mendelson, and asked them if they did not wish to buy this stock of goods. I told them that I had bought the stock of goods at twenty-five per cent below original cost, and paid less for some old and unsaleable goods, and would sell the

49 entire stock to them at twenty per cent. below the original cost. Lewis Ritter went with me, on or about the 12th of November, 1868, to Kingville, to look at the goods; Ritter examined them and then and there bought them for Walbrun, Bro. & Co. A second inventory was not taken, the reason was that I had just heard of my wife's sickness, and wished to return home. I told Ritter I would be responsible for all deficiencies, if the stock of goods did not correspond with the inventory, and Ritter agreed to take the stock with this understanding. The goods were packed in the store in which Mendelson had them when he sold them to me; they were packed in the daytime, and I think on the 14th of November, 1868. Mr. Ritter bought boxes from some of the merhants in Kingsville to pack the goods in, as Mendelson did not have enough. The goods were packed and carried to the station for shipment in the daytime, between 10 o'clock a. m. and 5 o'clock of the same day of which

they were packed. There was no concealment about removing the goods to the station for shipment, it being done public, and, as before stated, in the daytime. Ritter paid me between five and six thousand dollars cash for the goods, in the store in Kingsville, when the goods were packed, and on the same day they were packed. I told Ritter in Kingsville, before the goods were sold to Walbrun, Bro. & Co., that Mendelson and I married sisters. I do not know that I ever imparted this information to Daniel Walbrun. I told Daniel Walbrun and Lewis Ritter that Mendelson's reason for selling out was that there was too much competition in the dry-goods business in Kingsville, and that he wished to go into the hardware and furniture business, there being no competition in this line. Lewis Ritter heard Mendelson say the some thing in Kingsville. I had no cause to believe, at the time I bought the goods from Mendelson, that he was unable to pay his debts, from the
50 fact that the transaction was so public, that all the business men in Kingsville knew it. Daniel Walbrun and Lewis Ritter live in Chillicothe, Missouri. I do not know where Abraham Walbrun lives. I have not the original inventory in my possession now, nor do I know what was done with it. I furnished Walbrun & Co. a copy of it. In Nov., 1868, I was living in St. Louis, trading, and am now engaged in the furniture business in Friar's P't, Miss.

HERMAN SUMMERFIELD.

I, the said U. S. commissioner, further certify that the foregoing deposition of Herman Summerfield was then and there reduced to writing in the presence of said deponent, and by him subscribed in my presence after having been so reduced to writing. I further certify that the reason for taking said deposition was and is, and the fact was and is, that the deponent lives at the town of Friar's Point, in the State of Mississippi, more than one hundred miles from Jefferson City, in the said western district of Missouri, where the said civil cause is appointed to be tried, and that no notice was made or given by me to the said plaintiff, the adverse party or his attorney, to be present at the taking of the said deposition, and to put interrogatories, if thought fit, because neither said plaintiff nor his attorney were, to my knowledge, within one hundred miles of the place named in the caption where said deposition was taken, so as to enable notice to be given.

I further certify that it being impossible for me to deliver said deposition with my own hand into the court for which it was taken, I have retained the same for the purpose of being sealed up by me, and speedily and safely transmitted by the United States mail to the said court for which it was taken, and remain under my seal until there opened.

51 I further certify that the fees for taking said depositions, amounting to five dollars, have been paid to me by the defendants, and that the same was just and reasonable for the services performed.

In testimony whereof I have hereunto set my hand and private seal, (there being no official,) this 24th day of August, A. D. 1869.

W. L. STRICKLIN, [SEAL.]
U. S. Commissioner.

[5-cent cancelled rev. stamp.]

Deposition of W. Summerfield.

The deposition of William Summerfield, the brother of said Herman Summerfield, tending to show that he had long known the financial con-

dition of said Herman Summerfield; that at the time of the transaction in question between Herman Summerfield and Mendelson, and during the four years previous thereto, Herman Summerfield was not, and had not been worth over five hundred dollars at any one time; that, for eight or nine months next prior to May or June, 1869, Herman Summerfield had traveled through the State' of Missouri and Kansas as the traveling agent of the firm of William Summerfield & Co., of St. Louis, Mo., buying wool, feathers, and hides for said firm, and had several times bought such goods from Walbrun, Bro. & Co., at Chillicothe, Mo., for said firm; that for some two years prior to Herman Summerfield acting as such agent, he had been a member of the firm of L. & H. Summerfield, of St. Louis, engaged in the same business, and traveling for said last-named firm, and buying wool, feathers, and hides for said last-named firm.

Objections of defendants.

Defendants objected to so much of said deposition as tended to show the financial condition of said Herman Summerfield, as irrelevant
52 and incompetent, which said objection the court overruled, and defendants duly excepted then and there to said action of the court.

And here the plaintiff rested, and offered no further evidence.

And thereupon defendants prayed the court to instruct the jury as follows:

Defendants' instructions.

United States district court, western district of Missouri.

JAMES C. BABBITT, ASSIGNEE,
vs.
ABRAHAM WALBRUN ET AL.

And now, defendants, by their attorney, pray the court to instruct the jury:

That upon the whole evidence now before them in this case, if the same shall be believed by the jury, the plaintiff is not entitled to recover in this action—

1st. Because there is no evidence tending to show that defendants, or either of them, at the time they bought the goods in controversy, knew that Mendelson was insolvent or bankrupt, or contemplated bankruptcy or insolvency at the time he sold to Summerfield.

2nd. Because there is no evidence tending to show that defendants, or either of them, at the time they bought the goods in controversy, had reasonable cause to believe Mendelson to be bankrupt or insolvent, or to be acting in contemplation of bankruptcy or insolvency at the time Mendelson sold to Summerfield.

3rd. Because there is no evidence tending to show that the sale by Mendelson was made by him with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or
53 in any way impair, hinder, impede, or delay the operations and effect of, or to evade any of the provisions of said act, or that a fraud on the bankrupt law was intended by him.

4th. But granting such to have been the fact, so far as Mendelson is

concerned, there is no evidence tending to show that defendants, or either of them knew, or had reasonable cause to believe, such to have been the fact.

5th. Because there is no evidence tending to show that defendants participated in the original sale from Mendelson to Summerfield.

6th. Because there is no evidence tending to show that defendants or either of them knew, or had reasonable cause to believe, that the sale from Mendelson to Summerfield was fraudulent.

Instructions refused.

Which said instruction' the court refused to give; to which action of the court in refusing to give said instruction', the defendants then and there duly excepted.

The defendants offered no evidence, and rested.

The defendants hereupon prayed the court to give to the jury the following instructions, to wit:

2nd instructions of defendants.

1st. The jury are instructed that the mere fact that defendants, or any of them knew, when they bought the goods in question, that the sale to Summerfield by Mendelson was out of Mendelson's ordinary course of business, is not sufficient of itself to sustain the finding for plaintiff.

2nd. Unless the jury find from the evidence that one or more of the defendants knew when they purchased the goods from Summerfield, that Mendelson, when he sold them to Summerfield, was bankrupt or insolvent, or acting in contemplation of bankruptcy or insolvency, and that Summerfield had reasonable cause to believe Mendelson to be
54 bankrupt or insolvent, or acting in contemplation of bankruptcy or insolvency, when he, Summerfield, bought the goods; and that the sale was made by Mendelson, with a view to prevent his property from coming to his assignse in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in some way impair, hinder, impede, or delay the operation and effect of, or to evade some of the provisions of said act, or that a fraud on the bankrupt act was intended by said Mendelson, they will find for defendants.

3rd. Unless the jury believe from the evidence that Mendelson's sale to Summerfield was fraudulent, and that one or more of the defendants either participated in that sale, or at the time they purchased the goods from Summerfield, knew that Mendelson's sale to Summerfield was fraudulent, they will find for defendants.

4th. Unless the jury believes from the evidence that Mendelson made the sale to Summerfield with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in some way impair, hinder, impede, or delay the operation and effect of, or to evade some of the provisions of said act, or that a fraud on the bankrupt act was intended by him at the time of said sale, they will find for defendants.

5th. The jury is instructed that the plaintiff is not permitted, having introduced the evidence of witnesses, to discredit their general reputation for truth and veracity.

6th. The jury is instructed that fraud cannot be presumed, but must

be affirmatively shown by the plaintiff, or the verdict must be for defendants.

55 7th. The jury is instructed, that unless it appears in evidence that the election of Babbitt as assignee of Mendelson was approved by the court, they will find for defendants.

And thereupon the court instructed the jury as follows:

Instructions by the court to jury.

Babbitt vs. Walbrun & Co., for the value of a stock of goods, which he claims belonged to Mendelson, a bankrupt of whom he is assignee.

The 35th section of the bankrupt law provides that if any person, being insolvent or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and such payment, sale, assignment, transfer, or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt; and if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud. It will be observed that the sale must have been made within six months prior to the 14th day of December, A. D. 1868, the day of filing the creditor's petition against Mendelson.

Having found this fact, you will next inquire whether at the time

56 of the making of the sale, Mendelson was insolvent, and if so, whether Summerfield had reasonable cause to believe him (Mendelson) to have been insolvent, or acting in contemplation of insolvency and bankruptcy. Reasonable cause to believe means the putting of a man on enquiry; it does not mean parties' knowledge or actual belief, but a knowledge of facts and circumstances which would reasonably lead to such a belief. If Mendelson at the time of the sale to Summerfield was insolvent, and Summerfield had reasonable cause to believe it, the sale between Mendelson and Summerfield was void.

Your attention is next directed to the provisions of law already cited, namely, that if such sale, assignment, transfer, or conveyance, is not made in the usual and ordinary course of business of the debtor, Mendelson, the fact shall be prima facie evidence of fraud. By prima facie evidence of fraud is meant that the law presumes it to be fraudulent. It is, however, a presumption only, and may be rebutted. What the law means to say is, that if this sale by Mendelson was not in the usual and ordinary course of his business, the law will treat it as fraudulent, until it is shown to have been in good faith.

Was the sale from Mendelson to Summerfield in the usual and ordinary course of business? You are instructed, that if you find from the evidence that Mendelson made sale of the whole stock of goods on hand, and that by such a sale the business which had been carrying on stopped, and ceased to exist, such a sale was not in the ordinary course of business of Mendelson, and will be held under the law to have been prima

facie fraudulent, and will so be considered by you, unless you
57 shall be satisfied from the testimony in the case that it was made in good faith. Knowledge of a prima facie fraudulent sale, unexplained, puts those who have it on inquiry, as to the good faith in which such sale was made.

It is not, however, sufficient in this case to find the sale from Mendelson to Summerfield to have been either void or fraudulent. In order to find the issues against Walbrun, Bro. & Co., you must be satisfied that they participated in the fraudulent sale, or at least had reasonable cause to know the sale to have been fraudulent. The knowledge of the fact that the sale from Mendelson to Summerfield was made out of the usual and ordinary course of business is not of itself sufficient to impeach the purchase made by Walbrun, Bro. & Co., yet it is a circumstance proper for you to consider on the question of good faith on their part in making the purchase.

If you shall find from the evidence that the sale from Mendelson to Summerfield was prima facie fraudulent, and has not been shown to have been in good faith, and that Ritter, one of the partners of Walbrun, Bro. & Co. had knowledge of said sale, and how it was made, and you shall further be satisfied that Ritter found Mendelson in the possession & control of the stock of goods in controversy when he came to Kingsville to examine them, these facts, if found by you, will put Ritter upon inquiry. As to the good faith of the sale of Mendelson to Summerfield, the failure of Ritter to make such inquiry is a circumstance for you to consider in making up your verdict. Walbrun, Bro.
& Co. must be held to act as ordinary, prudent men, place' under
58 similar circumstances, would act. Whatever one of the partners of the firm of Walbrun, Bro. & Co. did or knew, is the act and knowledge of the firm. As to the weight you will attach to the testimony of the witnesses, that is peculiarly your province to determine.

If you find the issues for the plaintiff you will determine the value of the stock of goods, and specify in your verdict the amount found by you. If you find for the defendants, you will say so in your verdict.

Exceptions of defendants.

And thereupon the defendants excepted to the action of the court, in not instructing the jury as requested by defendants in the 2nd, 3rd, 4th, 5th, 6th and 7th instructions as prayed for by defendants; and defendants thereupon further excepted to the following parts of the foregoing instructions given by the court to jury, to wit:

1st. "The 35th section of the bankrupt law provides that if any person, being insolvent or in contemplation of insolvency or bankruptcy, within 6 months before the filing of the petition by or against him, makes any sale, assignment, transfer, conveyance or other disposition of any part of his property to any person, who then has reasonable cause to believe him to be insolvent or to be acting in contemplation of insolvency, and such payment, sale, assignment, transfer or other conveyance, is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property or the value thereof as
assets of the bankrupt, and if such sale, assignment, transfer,
59 or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud."

2nd. "If Mendelson, at the time of the sale to Summerfield, had reasonable cause to believe it, the sale between Mendelson and Summerfield was void."

3rd. "If you shall find from the evidence that the sale from Mendelson to Summerfield was prima facie fraudulent and has not been shown to have been in good faith, and that Ritter, one of the partners of Walbrun, Bro. & Co., had knowledge of said sale, and how it was made, and you shall further be satisfied that Ritter found Mendelson in the possession and control of the stock of goods in controversy, when he come to Kingsville to examine them, these facts, if found by you, will put Ritter upon inquiry as to the good faith of the sale of Mendelson to Summerfield. The failure of Ritter to make such inquiry is a circumstance for you to consider in making up your verdict."

And defendants pray that the following may be delivered as and for their bill of exceptions herein, and that the same may be signed and sealed by the court, and made a part of the record herein, which is accordingly done.

A. KREKEL, *Judge.*

We have examined the foregoing bill of exceptions, and believe the same to be correct.

EDMUND T. ALLEN,
Att'y for Def'ts.
NATHANIEL MYERS,
Counsel for Plaintiff.

JEFFERSON CITY, *Sept. 28th*, 1870.

(Endorsed:) Case No. 572. James C. Babbitt, assignee, vs. Abraham Walbrun et al. Defendants' bill of exceptions. Filed Sept. 28th, 1870. Adams Peabody, clerk.

60 *Bond for costs.*

In the district court of the United States, for the western district of Missouri.

JAMES C. BABBITT, ASSIGNEE OF MARKS MENdelson, bankrupt, plaintiff,
against
ABRAHAM WALBRUN, DANIEL WALBRUN, AND Lewis Ritter, defendants.

We, Joseph Franklin & Jno. B. Maude, of the county of St. Louis, in the State of Missouri, do hereby acknowledge ourselves held and bound to pay all costs which have accrued, or may accrue, in the above-entitled cause.

In witness whereof we have hereto subscribed our names this 13th day of September, A. D. 1870.

JOHN B. MAUDE.
JOSEPH FRANKLIN.

Attest:
LUCIEN EATON, *Register.*

Certificate of clerk.

UNITED STATES OF AMERICA,
Western District of Missouri, ss:

I, Adams Peabody, clerk of the district court of the United States for the western district of Missouri, hereby certify that the foregoing is

a true and complete transcript of the record and proceedings had in the above-entitled cause, together with the evidence in said cause as called for in the bill of exceptions filed therein, as fully as same appears of record and on file in this office.

In witness whereof I hereunto subscribe my name, and affix the
61 seal of said court, at office, in the city of Jefferson, district aforesaid, this thirteenth day of March, A. D. 1871.

[SEAL.] ADAMS PEABODY,
Clerk of said District Court for said District.

And afterwards, to wit, at a regular stated term of said circuit court, begun and holden at the city of St. Louis, in said districts, on the first Monday, the 3rd day of April, in the year of our Lord eighteen hundred and seventy-one, the following proceedings were had in said case on Thursday, the 6th day of April, in said last-mentioned year, to wit:

Assignment of errors filed.

JAMES C. BABBITT, ASSIGNEE, DEFENDANT IN error.
vs.
ARBAHAM WALBRUN ET AL., PLAINTIFFS IN error.

Writ of error to district court, western district of Missouri.

This day come the plaintiffs in error, by their attorney, Edmund T. Allen, esquire, and file their assignment of errors herein.

And said assignment of errors filed herein as aforesaid is in the words and figures following, to wit:

Assignment of errors.

United States circuit court, districts of Missouri.

JAMES C. BABBIT, ASSIGNEE, DEFENDANT IN error,
vs.
ABRAHAM WALBRUN ET AL., PLAINTIFFS IN error.
} In error.

Of April term, in the year of our Lord one thousand eight hundred and seventy-one.

And afterwards, on the sixth day of April, in this term, before the justices of the circuit court of the United States, at St. Louis, came
62 the plaintiffs in error in the above-entitled cause, by Edmund T. Allen, their attorney, and say that, in the record and proceedings aforesaid, there is manifest error in this, to wit, that the court excluded proper and competent evidence on the trial of said cause; that there is also manifest error in this that by the record aforesaid, it appears that the court allowed improper and incompetent evidence to be given on the trial of said cause; that there is also manifest error in this that, by the record aforesaid, it appears that the court refused to give legal, proper, and necessary instructions on the trial of said cause; that there is also manifest error in this that, by the record aforesaid, it appears

that the court gave illegal and improper instructions on the trial of said cause: that there is also manifest error in this that, by the record aforesaid, it appears that the judgment aforesaid was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land said judgment ought to have been given for the said plaintiffs in error; and the said plaintiffs in error pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment.

EDMUND T. ALLEN,
Att'y for Pl'ffs in Error.

Joinder in error.

And now comes the said defendant in error, and says there is no error in the record and proceedings in this as alleged by the defendants in error above.

NATH'L MYERS,
For Def't in Error.

And afterwards, to wit, at said regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Wednesday, the 19th day of April, in
63 said last-mentioned year, to wit:

Stipulation in regard to transcript filed.

JAMES C. BABBITT, ASSIGNEE, &C., DEFENDANT in error.
vs.
ABRAHAM WALBRUN ET AL., PLAINTIFFS IN error.

Writ of error to the district court of the United States for the western district of Missouri.

This day come the parties, by their respective attorneys, the defendants in error, by Nathaniel Myers, esquire, and the plaintiffs in error, by Edmund T. Allen, esquire, and file an agreement in writing, signed by said attorneys, agreeing that the deposition of Lewis Ritter was read in evidence in the court below, and that its omission from the record may be supplied by a copy of said deposition furnished by plaintiffs in error; and further agreeing that a good and sufficient bond having been filed in the district court of the United States for the western district of Missouri by the plaintiffs in error, and duly approved by the judge of said court, but a copy thereof having been omitted from the transcript, such omission shall not affect said case in this court.

Hearing of case submitted and taken under advisement.

And this case having been this day brought on for hearing, and the same having been fully heard, argued, and submitted to the court for a decree upon the record and proceedings in the district court of the United States for the western district of Missouri, and upon the case as made out and presented to this court, the court not being fully advised of and concerning the premises takes further time to consider thereof.

MEMORANDUM.—His honor Judge Krekel did not sit or take part in the disposition of said case.

And said agreement in writing, filed as aforesaid, is in the
64 words following, to wit:

Agreement.

United States circuit court, dist's of Mo.

JAMES C. BABBIT, ASSIGNEE, &C., D. E., *vs.* ABRAHAM WALBRUN ET AL., P. E. } In error.

The transcript from the district court of the western district filed herein being incorrect, it is hereby stipulated and agreed between the parties hereto that the deposition of Lewis Ritter was read in evidence in the court below, and that its omission from the record may be supplied by a copy of said deposition furnished by plaintiffs in error; and it is further stipulated and agreed that a good and sufficient bond having been filed in said district court by the plaintiffs in error, and having been duly approved by the judge of said court, but a copy thereof having been omitted from the transcript, such omission shall not affect said cause in this court.

EDMUND T. ALLEN,
Att'y for P. E.
NATH'L MYERS,
Att'y for D. E.

And the deposition of the said Lewis Ritter, taken before S. Turner, esq., N. P. of the city of Chillicothe, connty of Livingston, State of Missouri, on the 17th day of August, A. D. 1869, is in the words and figures following, to wit:

Deposition of Lewis Ritter.

LEWIS RITTER, being first carefully cautioned and duly sworn to speak the truth, the whole truth, and nothing but the truth, relating to the controversy aforesaid, deposeth and saith as follows: My age is thirty-five years. Residence, Chillicothe, Mo. My business, a merchant,
and am a member of the firm of Walbrun, Bro. & Co.; that firm
65 is composed of Daniel Walbrun, Abram Walbrun, and myself,
and carry on at Chillicothe, Mo., a clothing and dry-goods store, and deal in hides, wood, & furs. Said firm are also engaged in iron works at Stuart Co., Tennessee, and have a clothing and dry-goods house at Youngstown, Ohio, and, until the spring of 1869, were interested in a woolen-mill at said Youngstown, and said firm dealt in wool at said Youngstown. We also own and run a second dry-goods and clothing store in Chillicothe, Mo., and hold an interest in a dry-goods and clothing store at Linneus, in Linn Co., Mo. We own an interest in a general dry-goods & provision store in Stuart Co., Tenn., which we run in connection with said iron-works in Tennessee. We own a fourth interest in about from 9,000 to 11,000 acres of land, with iron-ore and farming lands, about one thousand acres of which are in cultivation. We own 400 acres of land in Livingston County, Missouri. I believe that our money invested in the two stores in Chillicothe, Mo., to be thirty thousand dollars. I believe our real estate in Livingston County and Chillicothe, Mo., to be of the value of $19,000. I believe that our interest in the store at Linneus, Mo., to be worth about

one thousand dollars. I believe that our interest in the Youngstown, Ohio store, is worth not less than ten thousand dollars. I believe and estimate the value of our interest in the Tennessee iron-lands and iron-works to be worth $25,000; all these figures and sums are rather under than over actual values. I do not believe we owe above eight thousand dollars at all the points of our business. I cannot state certainly the Tennessee and Ohio indebtedness. We do not owe at this point, above $2,500. Our business was the same as above stated, (excepting the sale of the woolen mill at Youngstown, Ohio,) during the months of Nov. & Dec., 1868. I am well acquainted with Herman Summer-
66 field—have been for four years. He formerly dealt in furs at St. Louis, & has frequently bought furs and dry hides of me at this place for cash. I have sold him furs and dry hides to the amount of 1,500 at a sale. Summerfield came here about the middle of November, 1868. He came to our store & stated that he had a stock of goods he wanted to sell me. He stated, on my inquiry, as to what kind of goods they were. He had a little of everything, but he had a great many boots and shoes. He showed me an invoice of the stock. He said on that bill he would deduct 20 % if I would buy. He told me had bought out a man's stock of goods who was going into the furniture business. I don't remember whether he told me the man's name or not; at all events I had never heard the man's name before. This conversation was in the presence of Daniel Walbrun, my partner. We needed some articles at this time for our stock, especially boots & shoes, & we agreed with Summerfield to take this bill of goods, at his offer, provided the goods were according to said invoice, and I went with Summerfield to Kingsville, Mo., where he said the goods were, to examine if they were as represented. We got into Kingsville about sundown. I inquired of Summerfield what hotel I should stop at. He said there was none; I must go with him to the house of Marks Mendelson, where he gave me an introduction to him. This was the man, he told me, of whom he had bought the goods. I had no conversation with Mendleson that night about these goods or business. Next day I told Summerfield I desired to look at these goods. I went with Summerfield and looked at them. We found them in a store close by the house, where I had passed the night. Some of them were boxed up and some in the
67 shelves. There was no one in the store except Summerfield, when I first went in said store, which was about 7 o'clock in the morning. I looked at the goods, found some of them in a bad condition—some gloves that were spotted and damaged. I complained about the gloves, & he said he had invoiced them at less on account of their condition. I then told Summerfield, after looking over the goods, hastly, that, after breakfast, I would commence taking the invoice; and after breakfast I, with Summerfield, commenced measuring the first goods on his invoice, which were calicos; after I had measured several pieces of calico he said, "Lewis, I am just married. My wife is sick. I am anxious to go home. If the goods are not right according to the invoice, I will make it all right with you." He said, "You know me. You have had dealings with me, and you know I will do what is right." I told him we had better invoice clear through, and if we would work pretty hard we would soon get through. He still insisted in desiring to get home to see his wife. I then said, "Go, then, and I will take the invoice when I get home." Myself & Summerfield then commenced putting the goods in the boxes. We got through in the afternoon. I hired a wagon & sent the goods to the depot, and got them all there that evening, but do not believe they got them on the train

until the next day. The summer goods, notions, boots, & shoes were already boxed. While we were taking the invoice, as far as we went, and boxing the goods, the store was open. Several persons came into the store. (Mendelson was there part of the time.) Some of these persons asked Mendelson why he sold out. He said he was going into the furniture business. Several of these persons told
68 him they were glad of it, as they thought it would be a good business, and that such store (furniture) was needed in town. Summerfield started for St. Louis, his home, that same night about 10 o'clock, and I left same night, and left Kingsville about 12 o'clock for Kansas City. I paid for those goods that same evening. He made a copy of the inventory which he had brought to Chillicothe that same day, in the store, after the goods were boxed. The whole amount, footed $7,164\frac{36}{100}$, from which he made a deduction of twenty per cent., amounting to $1,432\frac{86}{100}$, leaving the amount of $5,731\frac{50}{100}$, which amount I paid him in full in greenbacks or United States currency, and he receipted in full on the last-named invoice. This last-named invoice, with the receipt thereon, was per order of Judge Krekel, left on file with the United States district clerk, at Jefferson City, Jan. 7th, 1869. This money, which I paid to Summerfield, I took out of our safe; I took with me more than enough to pay for these goods, thinking I might run across some hides going or returning. After I heard the talk between Mendelson and the parties in the store about his going into the furniture business, Mendelson came to me and asked me how large a place Chillicothe was. I told him as near as I knew, and said to him that I believed Chillicothe would be a very good point for a good furniture store. He said he had a good notion to go and look at Chillicothe. I told him to come along. He came to Chillicothe along with me, and afterwards opened a dancing school at Chillicothe. When the goods came to Chillicothe, my partner, Daniel Walbrun, took charge of them.
My business being mostly outside in buying hides, mink-skins,
69 wool, &c. I had at no time any conversations with Mendelson about the stock of goods.

LEWIS RITTER.

Subscribed and sworn to at the place, on the day, and within the hours named in the notice hereto attached. Witness my hand & seal notarial.

S. TURNER, *N. P.*

And afterwards, at said last-mentioned regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Saturday, the 22nd day of April, in said year, to wit:

Final judgment.

JAMES C. BABBITT, ASSIGNEE, &C., DEFENDANT in error,
vs.
ABRAHAM WALBRUN ET AL., PLAINTIFFS IN error.

Writ of error to the district court of the United States for the western district of Missouri.

This day come the parties, by their respective attorneys, the plaintiffs in error by Edmund T. Allen, esquire, and the defendant in error by

Nathaniel Myers, esquire; and this case having been submitted to the court for a judgment upon the record and proceedings in the district court of the United States for the western district of Missouri, and upon the case as made out and presented to this court, the court being now fully advised of and concerning the premises, doth order and adjudge that the judgment of said district court rendered in this case be, and the same is hereby, affirmed; and further, that the plaintiffs in error, Abraham Walbrun, Daniel Walbrun, and Lewis Ritter pay the costs in this behalf expended; and that a certified copy of this judgment be transmitted to said district court for its action thereon.

MEMORANDUM.—His honor Judge Krekel did not sit or take part in the disposition of this case.

70 And afterwards, at said regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Monday, the 24th day of April, in said year, to wit:

Motion for rehearing filed.

JAMES C. BABBITT, ASSIGNEE, &C., DEFENDANT in error,
vs.
ABRAHAM WALDRUN ET AL., PLAINTIFFS IN error.

Writ of error to the district court of the United States for the western district of Missouri.

This day come the plaintiffs in error, by their attorney, Edmund T. Allen, esquire, and file their motion for a rehearing of this case for the reasons in said motion set forth.

And said motion for a rehearing of said case filed as aforesaid is as follows, to wit:

Motion for rehearing.

United States district court, dist's of Missouri.

JAMES C. BABBIT, ASSIGNEE, &C., D. E.,
vs.
ABRAHAM WALBRUN ET AL., P. E. } In error.

And now come plaintiffs in error herein, and move for a rehearing of said cause, particularly upon the admission of schedules in evidence in the court below. Edmund T. Allen, att'y for pl'ffs in error.

And afterwards, at said regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Wednesday, the 26th day of April, in said year, to wit:

JAMES C. BABBITT, ASSIGNEE, &C., DEFENDANT in error,
vs.
ABRAHAM WALBRUN ET AL., PLAINTIFFS IN error.

Writ of error to the district court of the United States for the western dist. of Mo.

71 *Motion for rehearing overruled.*

This day come the parties, by their respective attorneys, the plaintiffs in error by Edmund T. Allen, esquire, and the defendant in error by Nathaniel Myers, esquire; and the court having examined the motion heretofore filed by the plaintiffs in error for a rehearing of this case, and being now fully advised of and concerning the same, now orders that said motion be, and the same is hereby, overruled.

And afterwards, at said regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Saturday, the 29th day of April, in said year, to wit:

Death of Ritter, one of plaintiffs in error, suggested.

JAMES C. BABBITT, ASSIGNEE, &C., DEFENDant in error,
vs.
ABRAHAM WALBRUN ET AL., PLAINTIFFS IN error.

Writ of error to the district court of the United States for the western district of Missouri.

This day come the plaintiffs in error, by their attorney, Edmund T. Allen, esquire, who suggests the death of Lewis Ritter, one of the plaintiffs in error herein, and asks that said case may proceed in the names of Abraham Walbrun and Daniel Walbrun, as surviving plaintiffs in error; which is allowed by the court.

And afterwards, at said regular stated term of said circuit court, begun and holden as aforesaid, the following further proceedings were had in said case on Monday, the 1st day of May, in said year, to wit:

Order of supersedeas.

JAMES C. BABBITT, ASSIGNEE, &C., DEFENDant in error,
vs.
ABRAHAM WALBRUN ET AL., PLAINTIFFS IN error.

Writ of error to the district court of the United States for the western district of Missouri.

72 It is ordered that a supersedeas be granted, staying all further proceedings upon the judgment heretofore rendered in this case, a writ of error having been allowed to the Supreme Court of the United States, and a bond with sureties having been executed and approved, as required by law.

And said bond, approved as aforesaid, is in the words and figures following, to wit:

Bond of appeal.

Know all men by these presents that we, Daniel Walbrun as principal and John Z. Coblenz and Samuel Marx as sureties, are held and firmly bound unto James C. Babbitt, assignee of Marks Mendelson, bankrupt, in the full and just sum of ten thousand dollars, to be paid to the said James C. Babbitt, assignee as aforesaid, his successor or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this first day of May, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at the April term, A. D. 1871, of the circuit court of the United States, in a suit depending in said court between James C. Babbitt, assignee as aforesaid, and Abraham Walbrunn, Daniel Walbrunn, and Lewis Ritter, in which suit James C. Babbitt, as assignee, was defendant in error, and the said Abraham & Daniel Walbrunn and Lewis Ritter were plaintiffs in error, judgment was rendered against the said plaintiffs in error, and the death of the said Lewis Ritter having been suggested, and the said Abraham Walbrunn and Daniel Walbrunn, plaintiffs in error as aforesaid, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James C. Babbitt, assignee as aforesaid, cit-
73 ing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the first Monday of December next:

Now the condition of the above obligation is such, that, if the said Abraham Walbrunn and Daniel Walbrunn shall prosecute said writ to effect, and answer all damages and costs if they fail to make good their said plea, then the above obligation to be void; else to remain in full force and virtue.

DANIEL WALBRUNN. [SEAL.]
D. WALBRUNN.
JNO. B. COBLENZ. [SEAL.]
74 SOLOMON MARX. [SEAL.]

75 UNITED STATES OF AMERICA,
Circuit court for the districts of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of James C. Babbitt, assignee of Marks Mendelson, bankrupt, defendant in error, against Abraham Walbrun et al., plaintiffs in error, as fully as the same remains on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office in the city of St. Louis in said districts this tenth day of November, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.]

AUSTIN DRAKE,
Clerk of said Court.

(Indorsed:) United States circuit court, districts of Missouri. James C. Babbitt, assignee of Marks Mendelson, bankrupt, defendant in error, against Abraham Walbrun et al., plaintiff in error. Duly certified *of the* transcript of the record and proceedings in the above entitled cause.

76 UNITED STATES OF AMERICA, *ss:*

SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the districts of Missouri, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court, before you, at the April term, A. D. 1871, thereof, between James C. Babbitt, assignee of Marks Mendelson, bankrupt, defendant in error, and Abraham Walbrunn and Daniel Walbrunn, plaintiffs in error, (and Lewis Ritter, whose death has since been suggested,) a manifest error hath happened to the great damage of the said Abraham Walbrunn and Daniel Walbrunn, as by their complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the districts of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

SAMUEL TREAT, *Judge.*

77 UNITED STATES OF AMERICA,
Districts of Missouri, ss:

In obedience to the within writ I herewith forward and transmit to the Supreme Court of the United States a duly certified copy of the record and proceedings in the within entitled case.

September 10, 1871.

AUSTIN DRAKE,
Clerk of the Circuit Court of the United States for the Districts of Missouri.

78 The United States of America to James C. Babbit, assignee of Marks Mendelson, bankrupt, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the districts of Missouri, wherein Abrabam Walbrunn and Daniel Walbrunn, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the

said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, one of the judges of said United States circuit court this first day of May, in the year of our Lord one thousand eight hundred and seventy-one.

SAMUEL TREAT.

79 I, Jas. C. Babbitt, assignee of Marks Mendelson, hereby waive service of the within citation by an officer, and accept duly the service of the same.

May 3d, 1871.

JAMES C. BABBITT,
Assignee of Marks Mendelson.

(Indorsement on cover:) No. 445. Abraham Walbrun and Daniel Walbrun, plaintiffs in error, vs. James C. Babbitt, assignee of Marks Mendelson, bankrupt. Missouri, C. C. U. S. Filed 1st December, 1871.

REC. 445—4

IN THE

Supreme Court of the United States.

December Term, 1872.

ABRAM WALLBRUN, ET AL., PL'FFS IN ERROR,
vs.
JAMES C. BABBITT, ASSIGNEE. } *No.* 208.

Brief of Counsel of Plaintiffs in Error.

1ST—ABSTRACT OF THE CASE.

This was an action of trover commenced in the district court of the United States for the western district of Missouri.

John C. Babbitt, assignee of the bankrupt, Marks Mendelson, brought his action against plaintiffs in error, averring that Mendelson had been adjudged bankrupt, 24th December, 1868, and Babbitt appointed assignee, 26th January, 1869, and received on that day deed of assignment of all Mendelson's property, and among others, "inventory of goods of great value, viz., eight thousand dollars, which defendant has converted, and, though requested, refuses to deliver."

Record, pp. 1 and 2.

Defendants pleaded "not guilty" in manner and form and put themselves upon the country, (Record, p. 3,) and plaintiff did the like, (Record, p. 4.) The jury found for the plaintiff, and assessed damages $4,593.55.

See Record, p. 5.

And judgment in district court accordingly.
Record, pp. 5 and 6.

The case was then carried in error to the circuit court of the eighth judicial circuit, and heard before Judges Dillon and Treat, who reversed the judgment and remanded the cause for a new trial.
See 1 Dillon, p. 19.

The case was tried again in the district court on the 26th and 28th September, 1870, when the jury gave a verdict for $5,735.50, (see Record, pp. 6 and 7,) on which judgment was given accordingly, (Record, p. 7.) The case was again taken to the circuit court, and the judgment was affirmed. The defendants have taken this writ of error.

The facts of the case as they are found in the record appear to be:
That Marx Mendelson was declared a bankrupt by judgment of the United States district court for western district Missouri, on 24th December, 1868.
See Record, p. 8.

James C. Babbitt, the plaintiff in error, was duly appointed assignee, and assignment made to him 20th January, 1869.
Record, p. 9.

Mendelson deposes to the following facts: In the fall of 1868, Mendelson was a merchant in Kingsville, Mo., and sold his stock of merchandise to Herman Summerfield, in the latter part of October or beginning of November of that year.
Summerfield lived in St. Louis, Mo., at the time. Mendelson wrote to him to come to Kingsville and bring some

money with him, as Mendelson proposed to sell out to him, and he (Summerfield) might make some money by it.

Summerfield came accordingly about 1st November, 1868, and Mendelsohn proposed to sell him his stock at what it was worth, telling him he intended to go into another business in a store then being built near by.

They then took an account of stock at what Mendelson considered it to be worth, and as the stock was old and in bad condition, Mendelson sold it to Summerfield at twenty-five per cent. off the inventory, for cash.

After a few days, Summerfield said that it would not pay him to stay in Kingsville, and that he would go to see some persons who had money, and if he could sell the goods to these he would dispose of them and return to St. Louis. Summerfield went away, and in a few days returned with Mr. Ritter, of the firm of plaintiffs in error, who were established at Chillicothe, Mo.

For above, see Rec., p. 15.

Summerfield had no knowledge that Mendelson was insolvent, and knew nothing of his business; he paid him for the stock, in cash, something over five thousand dollars.

After Ritter, one of the plaintiffs in error, and Summerfield, had looked over the stock, the latter sold it to the former, who paid for it in cash at the time.

See Rec., p. 16.

The goods were immediately boxed up and shipped to plaintiffs in error at Chillicothe, Mo.

At the time Mendelson failed, his indebtedness was between nine and ten thousand dollars.

The goods bought by plaintiffs in error were not worth more than five thousand.

See Rec., p. 17.

Summerfield deposes to the facts as follows:

He bought the goods from Mendelson for twenty-five per cent. under original cost, and paid for them in cash between $5,000 and $5,500.

Witness agreed to sell the goods to plaintiffs in error for 20 per cent. under the original cost; they agreed to take them if they liked them; one of the firm, Ritter, went with him to Kingsville to examine them, and then took the goods and paid him for them in cash.

See Rec., p. 20.

Mendelson and Summerfield married sisters. Previous to this sale there had been no transactions between them.

Rec., p. 21.

The original cost of the goods was something over seven thousand dollars. Summerfield paid for them between $5,000 and $5,500 in money.

Rec., p. 22.

William Summerfield, the brother of Herman, swore that at the time of the alleged purchase from Mendelson the former was not worth $500.

Rec., pp. 26 and 27.

Lewis Ritter shows that the commercial firm of plaintiffs in error were largely engaged in business, and had ample means.

Rec., pp. 34 and 35.

That Herman Summerfield came to their store in November, 1868, and offered to sell a stock of goods at 20 per cent. off the prices in the invoice, which he displayed. Plaintiffs in error needed some of such stock, and Ritter went with Summerfield to Kingsville to examine them.

Rec., p. 35.

The amount of the inventory of the goods was $7,164.36, from which he deducted 20 per cent., leaving $5,731.50, which amount Ritter paid Summerfield at the time in cash, which he had taken out of plaintiffs in error's safe at Chillicothe, and brought with him to Kingsville.

Rec., p. 36.

It also appears that Summerfield took with him to Chillicothe the original inventory and invoice of the goods from Mendelson to him, with Mendelson's receipt annexed. And when Summerfield sold to the Walbruns he made a copy of the inventory that same day in the store after the goods were boxed. "This last-named invoice, with the receipt thereon, was, *per order of Judge Krekel*, left on file with the United States district clerk at Jefferson City, January 7, 1869," (see Rec., p. 36,) before the action of the assignee was begun, March 8, 1869.

See Rec., p. 2.

After the sale on 7th September, 1869, Mendelson said he had lost the money, felt badly about it, &c., &c.

Rec., p. 19.

All the testimony in the case appears to have been taken about the same time: Mendelson's, 8th and 9th September, 1869, (Rec., p. 14;) Summerfield's, 24th and 30th August, 1869, (Rec., pp. 19 and 24;) Lewis Ritter's, 17th August, 1869, (Rec., p. 34.) It forms a consistent whole, and was all offered by the assignee in the court below.

Rec., pp. 27, 28.

The verdict and judgment was for very nearly the same amount of money as the Walbruns had paid for the goods. Five thousand seven hundred and thirty-one dollars and fifty cents was the price of the goods; $5,735.50 the amount of the judgment.

Rec., pp. 7 and 36.

Questions.

The questions involved are:

First. Can a sale, made under such circumstances, to one who is not a creditor, and who, knowing nothing of the designs of the trader, whatever they may have been, pays 80 per cent. of the original cost of the goods in cash, be declared null and void, and set aside under the bankrupt law?

Second. Under the facts set out in the record, can the plaintiffs in error be charged with such notice as in law renders their purchase from Summerfield of the stock of goods fraudulent, and liable to be set aside in this action?

Third. If the purchase of the stock by plaintiffs in error can be set aside, must it be without refunding them the price they paid?

These questions arise on the bills of exceptions taken by the plaintiffs in error to the rulings of the court below on the prayers for charge and refusals to charge, and on the exceptions as to rulings on evidence.

Assignment of Errors.

First. The court erred in instructing the jury as follows:

"You are instructed that if you find from the evidence that Mendelsohn made sale of the whole stock of goods on hand, and that by such sale the business which had been carrying on stopped and ceased to exist, such a sale was not in the ordinary course of business of Mendelsohn, and will be held under the law to have been *prima facie* fraudulent, and will so be considered by you, unless you shall be satisfied from the testimony in the case that it was made in good faith. Knowledge of a *prima facie* fraudulent sale, unexplained, puts those who have it on inquiry, as to the good faith in which such sale was made."

See Rec., pp. 29 and 30.

A. It is not true, as stated, that a sale of the whole stock

of goods Mendelsohn had on hand was not in the ordinary course of business.

It is as much the usual and ordinary course of business to sell a whole stock as to sell a single article. The only difference is, the former transaction does not occur so often as the latter, but that difference is one of accident, and not of the essence of the transaction.

A sale on unusual terms of any or all of a stock would be out of the usual course, but a sale for cash never can be so considered. Every trader has a common law right to change his business whenever he pleases, and to enable him to do so, he may find it to his advantage to sell his whole stock, and such sales are not of rare occurrence; in large cities they are frequent.

In Graham *vs.* Chapman, (12 J. Scott, p. 103,) it was held that—

"The sale of a trader's stock to a *bona fide* purchaser for a fair price has been held not to come within the rule, even though creditors may be ultimately delayed or defeated, and the misapplication of the proceeds was contemplated by the trader at the time of the sale, because the trader gets a present equivalent for his goods, *and the sale is strictly in the course of his business.*"

B. Whether the sale of the whole of Mendelsohn's stock was or was not in the ordinary course of business, was not a question of law but one of fact, which the court had no right to take from the jury.

The 35th section of the bankrupt law (14 Stat. at Large, p. 534) does not say that the sale of an entire stock by a trader is *prima facie* evidence of fraud; it only says that a sale out of the usual and ordinary course of business is such, and the judge erred in charging as matter of law what the statute does not lay down.

And the court was wrong in what was said about stop-

ping the trade, for the court here mistook the meaning of the law:

"The true test is not whether the necessary effect of the deed is to stop the trade, but whether its necessary effect is to delay the creditors of the trader."

See Parke, B., in Smith *vs.* Camman, 2 Ellis & Blackburn, p. 45.

Re Wood, Equity Series, 1872, pt. V, May, p. 308.

C. The entire charge of the judge, as quoted, seems founded in some misapprehension. Whether a sale of a whole stock of goods on hand be made out of "the usual and ordinary course of business of the debtor" is clearly a "FACT" by the very terms of the section 35th. If jury trials be particularly efficient and admirable in their operation on the innumerable cases of commercial frauds, a binding instruction of the kind complained of must be erroneous.

It is also plain from the statute that it is only when the jury shall have found the fact that the sale was made out of the usual and ordinary course of business that it becomes *prima facie* evidence of fraud; not of fraud generally, but of fraud *under and against the provisions of the bankrupt law.* For, if this were a case under the statute of Frauds, all that the Walbruns would have to prove to show their good faith would be the payment of the price of the goods.

Mercer *vs.* Peterson, L. R., 3 Exchequer, 104.

Redfield Comp. *vs.* Dysart, 12 Smith, (Pa.,) 66.

And the sale must be, besides, not only outside of the usual and ordinary course of business generally, but outside, specifically, *of the business of the debtor.* All these matters should not have been given to the jury under the binding instructions of the court. They fall within the proper and well-recognized limits of the province of a jury.

Second. The court below erred in charging the jury as follows: "In order to find the issues against Wallbrun Brothers & Co., you must be satisfied that they participated in the fraudulent sale, or at least had reasonable cause to know the sale to have been fraudulent. The knowledge of the fact that the sale from Mendelsohn to Summerfield was made out of the usual and ordinary course of business is not of itself sufficient to impeach the purchase made by Wallbrun Brothers & Co., yet it is a circumstance proper for you to consider on the question of good faith on their part in making the purchase."

See Rec., p. 30.

These expressions must necessarily have led the jury astray. The court had already instructed them that the sale of Mendelsohn's whole stock to Summerfield was out of the usual course, and being so, was *prima facie* fraudulent; therefore, to tell them that, and to tell them that they were to consider a knowledge of such sale as an element of bad faith in Wallbrun—having already said that such sale was fraudulent—was really telling them, as a matter of law, that Wallbrun had committed a fraud; it took the case out of the hands of the jury and really made a verdict for them.

Third. The court below erred in charging the jury: "If you find from the evidence that the sale from Mendelsohn to Summerfield was *prima facie* fraudulent, and has not been shown to be in good faith, and that Ritter, one of the partners of Wallbrun Brothers & Co., had knowledge of said sale and how it was made, and you shall further find that Ritter found Mendelsohn in the possession and control of the stock of goods in controversy when he came to Kingsville to examine them, these facts, if found by you, will put Ritter on inquiry. As to the good faith of the sale of Mendelsohn to Summerfield, the failure of Ritter to make such

inquiry is a circumstance for you to consider in making up your verdict."

This charge is clearly wrong. Let it be conceded that Ritter knew that Summerfield had bought the whole of Mendelson's stock at twenty-five per cent. below original cost, which is what the judge had told the jury was *prima facie* a fraudulent sale, and let it be conceded that Ritter found Mendelson in possession of the goods; what then? As between Mendelson and Summerfield, the sale had been concluded, the latter had become the owner of the goods, and the possession of Mendelson was only as Summerfield's agent; and what inquiry could such a circumstance put Ritter upon which could affect, as the judge says, the sale from Mendelson to Summerfield?

Fourth. The court erred in refusing to instruct the jury "that upon the whole evidence before them, if the same shall be believed by the jury, the plaintiff is not entitled to recover."

See Rec., p. 27.

The defendant offered no evidence on the trial; all the evidence came from the plaintiff.

See Rec., p. 27.

The whole evidence showed nothing more than that Mendelson sold his entire stock of goods to Summerfield for 25 per cent. below original cost; that Summerfield paid for them in cash; that he knew nothing of Mendelson's being insolvent, and that he sold the goods again to Ritter for 20 per cent. less than cost, thus making five per cent. by the operation; that Ritter paid for them in cash, knew nothing of Mendelson's being in insolvent circumstances, and that neither Summerfield nor Ritter, nor his firm, were creditors of Mendelson.

It has been said to be the object of the 35th section of the bankrupt law to place strangers on the same footing as creditors in their dealings with a trader in insolvent circumstances. Let this be conceded. But a creditor who deals with a trader for cash is not, in such transaction, a creditor at all.

See Baxter and another, assignees of Hill *vs.* Pritchard, 1 Adolphus & Ellis, p. 456.

See Ross *vs.* Haycock, reported as a note to the foregoing case.

See Lee *vs.* Hart, 10 Exchequer, p. 558.

The foregoing cases show that the sale of the whole of a trader's stock is not of itself alone fraudulent—is not an act of bankruptcy.

In considering the case of the assignment of the whole of a trader's estate, and its being void under the British law, Cockburn, C. J., said: "On this, one exception has been grafted: it is when the trader in disposing of his effects gets something which to him and his creditors is an equivalent;" and Brittlestone *vs.* Cooke, (6 E. & B., p. 296,) shows that an equivalent need not be an actual equivalent in point of value. It may be that the trader gets less than the value of the property he parts with.

In Brittlestone *vs.* Cooke, (6 Ellis & Blackburn, p. 307,) Lord Campbell, C. J., said: "I think that a conveyance by a trader of goods with a view to obtain future advances is not necessarily, as a matter of law, an act of bankruptcy, though the whole of the trader's stock, present and future, is included in the conveyance." In this case the advance was £1,800, and the goods conveyed were of the value of £6,000, but it was still held that such a disproportion did not of itself render the sale fraudulent.

See, also, Mercer *vs.* Peterson, in the Exchequer Cham-

ber, Law Reports, Court of Exchequer, vol. 3, p. 104.

Woodhouse *vs.* Murray, Law Reports, 4 Queen's Bench, pp. 30 and 31.

And it was recently said by Sir James Bacon, C. J., in discussing, in a bankruptcy case, the question of what is "an equivalent:"

"It was contended that it was an act of bankruptcy because the property of the debtor was parted with, for which his creditors received no equivalent. 'Equivalent,' no doubt, is an expression which may mislead; but I do not understand that in any of the cases it means a substantial sum of money paid down. If the trader carrying on his business has something done for him which enables him to continue carrying it on, that is an equivalent. It does not go directly to the creditors, but the creditors are greatly interested in the fact of the man carrying on his business; and if the transaction enables him to do so, it cannot be said that the creditors had not some equivalent. The question as to the amount was never raised in any of the cases, but it is used only as a test of good faith in the transaction, and to exclude the notion that by means of the agreement, whatever it was, the object was to prefer one creditor to the other."

See *Ex parte* Reed & Steele, *in re* Tweddle, Law Reports, Equity Series, vol. 14, p. 593.

Fifth. The court below also erred in not charging the jury "that the plaintiff is not permitted, having introduced the evidence of witnesses, to discredit their general reputation for truth and veracity," as requested by defendants.

See Record, p. 28, foot.

All the depositions in the trial, it appears, were introduced by plaintiff. The witnesses, then, were his; and the judge should have charged the jury that if the witnesses of

plaintiff were uncontradicted, they, the jury, were bound to believe them; and that the plaintiff had no right, in law, to ask the jury to suppose that they had not told the truth.

Sixth. And in charging, in view of the preceding point: "As to the weight you will attach to the testimony of the witnesses, that is peculiarly your province to determine," (Record, p. 30.) The assignee relies for his facts upon the evidence taken for the defence. If this evidence be credible and true, it completely vindicates the Walbruns from both notice and fraud, and exhibits on their part a perfectly fair and business-like transaction. If incredible and false, it leaves the assignee without any proof of the alleged fraud; and hence, the jury will have presumed fraud and fastened it upon defendants without evidence, contrary to the next assignment of error. Neither could there be, in either case, the needful proof rigorously required in every action of trover. If the assignee's allegation be a conversion of the bankrupt's property *before* proceedings begun against him, there is no proof whatever of the fact in the record; but on the other hand, if the testimony be believed, there is proof of a purchase and delivery for a full and fair price in cash, and then the case of Billiter *vs.* Young, (8 H. L. C., 682,) directly applies. All the assignee's evidence, true or false, negative any conversion *after* the bankrupt proceedings have been begun. Indeed, this is not pretended, although distinctly alleged, in the *Narr.*

Seventh. The court below erred in not charging the jury, as requested by the defendants, as follows: "The jury is instructed that fraud cannot be presumed, but must be affirmatively shown by the plaintiff, or the verdict must be for defendants."

See Rec., pp. 28 and 29.

As has been said, all depositions in evidence were offered by the plaintiff below. They declare that there was no fraud in the sale, and that there was no knowledge—either on the part of Summerfield or on that of Ritter, one of the plaintiffs in error—of the condition of Mendelson's affairs; this was a case, therefore, where the judge should have charged the jury as prayed, with strong observations as to the entire absence of all proof of fraud.

That any portion of the price of the goods was disposed of *fraudulently* by the bankrupt *to the prejudice of his creditors* does not appear from this record. Besides, even in cases of fraud, actual or constructive, the law is never vindictive, and carefully limits itself to compensation from the offender. The question always is, *quantum damnificatus?* (Story's Equity, § 795.) The assignee could not have a greater remedy at law than on a bill in equity. In trover there is no room for exemplary or punitive damages.

Eighth. The court below erred in charging the jury: "If Mendelson, at the time of the sale to Summerfield, was insolvent, and Summerfield had reasonable cause to believe it, the sale between Mendelson and Summerfield was void."

Record, p. 29.

This charge is an evident misapprehension of the provisions of the 35th and 39th sections of the bankrupt act. If the principle enunciated by the judge were true, it would paralyze all commerce. The nullity pronounced by the statute is *relative* only, and none but creditors can take advantage of it. If creditors be not injured, the sale stands. This important point the judge unfortunately overlooked, being no doubt misled by the ambiguous use of the word "*void*" in the 35th section.

Young *vs.* Billiter, 8 H. L. C., 682.

Ninth. And he also erred in admitting the testimony of Franklin, as to admissions of Mendelson some time after the sale, to wit, on the 7th September, 1869, that "*he had lost the money.*"

Rec. p. 19.

This evidence was irrelevant, because it concerned in no way the issue joined between plaintiff and defendant; incompetent, because *post litem motam*, and made out of the presence of the Wallbruns; immaterial, for whether true or false it did not touch the matter in hand.

Had Mendelson left the State of Missouri and gone to parts unknown with the purchase money, thus defrauding the creditors, then the assignee might, perhaps, complain of Summerfield if he knowingly bought the goods of the bankrupt, and aided him to fly with the money from his creditors. But this is not such a case. The bankrupt changes his business, but does not withdraw himself or his money from the State or the jurisdiction of the judge in bankruptcy. He stands his ground, although if he gave a false account of his loss he could be imprisoned as for a contempt, or tried quasi-criminally by a jury, under the clause of "*fictitious losses*" in the 44th section of the bankrupt act.

Tenth. The assignee has mistaken his remedy. On the facts as proved no action of trover will lie.

Young *vs.* Billiter, 8 H. L. C., 682, *ut sup.*

Eleventh. The learned judge erred in not charging as requested by defendants' counsel: "Unless the jury believe from the evidence that Mendelson made the sale to Summerfield with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under the bankrupt act, or to defeat the object of, or in some way impair, hinder, impede, or delay the

operation and effect of, or to evade some of the provisions of said act, or that a fraud on the bankrupt act was intended by him at the time of said sale, they will find for defendants."

The assignee's proof, if admissible and properly received, shows that the bankrupt *lost* the money. If true, how could the Walbruns collude in any way with the bankrupt to produce this loss? Or in what way is the loss a fraud on the bankrupt law? A real loss is entirely unaffected by the bankrupt act. If Mendelson really lost the money, his creditors are the sufferers; under no circumstances are third persons, who have dealt with the bankrupt in good faith. Mendelson might "ruin, destroy, waste, squander, or employ to no good purpose," the money received for his goods, but unless he alleges a *fictitious* (sham, simulated, imaginary, unreal) loss, he escapes all injury from the provisions of the act, provided he has not *spent the money in gaming*. So, too, if the price of the goods whilst in the custody of the bankrupt had perished by fire or flood, or any other *vis major*, his creditors would sustain the loss.

The record is entirely silent as to what became of the money of the Walbruns, unless the bankrupt really lost it; nor is it shown that any account of the money has ever been demanded of the bankrupt by his creditors or assignee. Hence, in law, if the loss be *fictitious*, the cash proceeds of the goods bought by the Walbruns are still in the bankrupt's hands, and if they have been used illegally, he can be made, by a perpetual imprisonment as for a contempt, to pay any sum of money withdrawn or detained from his creditors. In the eastern district of Pennsylvania, an involuntary bankrupt named Lance Walker is now, and has been since July, 1871, imprisoned under the provisions of the bankrupt law, by the order of the judge, and without any trial by jury; and since 3d April, 1872, under a special

order to pay his assignee $1,831, and "*that he stand committed, if the same be not paid, to the custody of the marshal, until payment thereof.*"

The court should have charged the jury as requested in these assignments of error, (tenth and eleventh,) because the whole matter pivots on injury to creditors; and the assignee evidently felt the stress of this principle, for it was an essential part of his case which he was bound to prove. Not the mere intent to defraud or to violate the bankrupt act, but an intention carried out to the injury of the creditors. In all cases involving actual or constructive fraud, the good name of the party charged is more or less involved, and the burden of proof is rigorously devolved on him who alleges it, as shown in the seventh assignment. Here the fraud is not openly alleged, but covered up by the law-fiction involved in the action of trover and conversion. The assignee does not look into the eyes of the court through a bill in equity, but gazes vaguely at a jury, and chooses the uncertain chances of a jury trial to indemnify his principals for a loss which they never sustained by any act of the Walbruns.

The fact that the bankrupt lost the money was, then, in the opinion of the assignee, a necessary part of his case. If true, it traces the Wallbruns' money beyond a possible doubt into the possession of the bankrupt; it proves the payment to him of a full price for the goods, and, without more, entirely negatives the existence of any fraud of any kind on the part of the Wallbruns in the transaction. To benefit the assignee, it should have been followed by the clearest proof that the Wallbruns, *after* the loss, had found and converted the property to the injury of creditors, which is the fictitious allegation of the assignee's *Narr.* (Rec., p. 2.) But the creditors allege a loss of an "inventory of goods omitted," of which the assignee was lawfully possessed as

of property in right of said bankrupt; that the assignee lost the goods "specified herein," and that afterwards they "came to the possession of defendants by finding." As, in the fiction of law, equity always inheres, so the court will not endure its being made, especially in bankrupt cases, an instrument "to work a wrong, contrary to the real truth and substance of the thing." Now, as to the bankrupt, it is quite undeniable that the Wallbruns had the perfect title and ownership of the goods by virtue of an executed contract before any proceedings in bankruptcy were initiated, and that the *allegata* and *probata* of the assignee are irreconcilably antagonistic.

By itself, the proof that Mendelson lost the money was inadmissible. Its tendency was directly to injure the defendants with the jury. The question before them was not as to any general fraud in the bankrupt, for he was not on trial, but as to the special fraud of defendants against the bankrupt act. This was not the view of the matter taken by the courts below; the case was virtually taken away from the jury; they were not informed "*where the main question or knot of the business lay*," to wit: the violation of the bankrupt act and the injury done by the Walbruns to the creditors of Mendelson. Of this violation and injury there is no proof in the record, and without it the case should have been submitted to the jury, with instructions to find for the defendants. But the court declined to charge the jury even to the limited extent asked for in the present assignment of error.

The court is respectfully asked to reverse the judgment, and to remand the case, with direction to dismiss the suit at the costs of the assignee.

THOMAS J. DURANT,
for Plaintiffs in Error.

IN THE UNITED STATES SUPREME COURT.

DECEMBER TERM, 1872.

BABBITT, Assignee, &c., D. E.,

vs.

WALBRUN, *et. al.*, P. E.

Statement and Brief for Babbitt.

Levison & Blythe, Printers and Stationers, 219 Olive Street, St. Louis.

IN THE

United States Supreme Court.

DECEMBER TERM, 1872.

BABBITT, ASSIGNEE, &c., D. E., *against* WALBRUN, *et. al.*, P. E.	*Error to the United States Circuit Court for the Eastern District of Missouri.*

Statement of the Case for Babbitt.

This is an action of trover brought by Babbitt, as assignee in bankruptcy of Marks Mendelson a bankrupt, to recover the value of a stock of merchandise sold by the bankrupt to one Summerfield, and by the latter to defendants.

The plaintiff claims the several transfers to have been frauds on the Bankrupt Law, under the 35th section thereof.

The case was tried in the U. S. District Court for the West Dist. of Mo. and judgment rendered for the plaintiff in the sum of $5735.50. The case is here by writ of error.

The record discloses the following undisputed facts:

In Nov. 1868, Mendelson was engaged in general merchandising in the town of Kingsville, Mo., and was possessed of a stock of goods that cost between $10000 and $11000. It was considered by Mendelson to be fairly worth $7164.

Mendelson owned no other property at that time. He then owed different houses, in St. Louis alone, between $8000 and $10000. He concluded to sell out his stock. He had a brother-in-law in St. Louis named Herman Summerfield. He accordingly wrote to Summerfield to come to Kingsville; that there was some business for him; and that probably he (Summerfield) could make some money out of it.

Thereupon Summerfield at once went to Kingsville, taking with him in currency, as he says, money enough for the purpose

Arriving there, Mendelson proposed to sell out his stock to him; to sell out at what the stock was worth at that time. An account of stock was accordingly taken at what *Mendelson* considered it fairly worth.

It amounted to $7164.36; 33 per cent. below its original cost.

Summerfield said he would not purchase unless Mendelson would deduct 25 per cent. from that amount. At that discount he would purchase. Mendelson agreed; he deducted 25 per cent. making the purchase price $5373.26, nearly $2000 less than what he considered the stock worth, which amount he testifies was paid him by Summerfield at the time.

Mendelson testifies he sold out his stock because he could not succeed in that business, and intended to commence the hardware and furniture business, and so informed Summerfield.

There was no inquiry of any sort beyond this.

Mendelson did not say anything to Summerfield about any debts that he owed to anybody.

This is a fair history of the sale from Mendelson to Summerfield.

It was made on the 6th Nov., 1868.

After the purchase, Summerfield remained in Kingsville several days, the store being kept open by Mendelson, who continued to sell in the regular course of his business as formerly, without rendering any account of his sales.

Summerfield, leaving Mendelson in such possession of the store, went at once to the town of Chillicothe, Mo., and told the defendants he had purchased the above stock of goods from Marks Mendelson at 25 per cent. below cost, and would sell to them at 20 per cent below cost; that he wanted to make only 5 per cent.

Defendants agreed to give Summerfield 20 per cent. below invoice price, provided the goods equaled his representations. Accordingly Lewis Ritter, one of the defendants, went with Summerfield to Kingsville to see the goods.

Arrived there, the two spent the night at the house of Mendelson, where Summerfield introduced Ritter to Mendelson as his brother-in-law, and told him Mendelson was the man from whom he had bought the stock.

About seven o'clock the next morning, Ritter and Summerfield went to examine the goods at the store. Some of the goods were in a bad condition, and Ritter complained of them. After measuring several pieces of goods, Summerfield excused himself from further service, saying he had to return to St. Louis; told Ritter to take the goods, and that if, when he got them home, he should not find them all right, he (Summerfield) would make it all right. Ritter replied that if they would work pretty hard *they would soon get through.*

Ritter however yielded, and with the assistance of Mendelson the goods were at once boxed up, and immediately taken to the depot and shipped to Chillicothe. This was early in the morning. Summerfield, however, remained in Kingsville all day, and did not leave for his home in St. Louis until 10 o'clock that night.

Ritter had, however, paid him in cash for the goods that same evening, having also taken with him enough currency for the purpose, no account being taken of what Mendelson had sold in the interim.

At 12 o'clock that same night, Ritter returned to Chillicothe, Mendelson going along with him.

Mendelson did not go into the hardware business, nor into any other business, but opened a dancing school in Chillicothe, and said he had lost the money he got from Summerfield.

The defendants knew nothing of the debts owing by Mendelson.

They made no inquiry of any kind of him!

Summerfield was the only purchaser sought by Mendelson, and the defendants were the only ones sought by Summerfield.

Mendelson was afterwards declared a bankrupt, and on the 20th

of January, 1869, the Register conveyed his estate and effects to the plaintiff as his assignee.

On the trial, the defendants objected to certain testimony and also to portions of the Judge's charge to the Jury, all of which will be noticed in our argument.

Brief and Argument for Babbitt, D. E.

I.

As a matter of law the sale by Mendelson to Summerfield was out of the usual and ordinary course of Mendelson's business, and was therefore *prima facie* fraudulent.

The last paragraph of the 35th section of the Bankrupt Law reads as follows:

"And if such sale, etc., is not made in the usual and ordinary course of the business of the debtor, that fact shall be *prima facie* evidence of fraud."

a. One cannot conceive of a transaction more *out* of the *ordinary* and *usual* course of Mendelson's business than this sale, for the reason that it completely annihilated that business. An act which strikes alarm to one's creditors can hardly be said to be an act within the usual and ordinary course of that business, for the *conducting* of which they sold him the goods; nor can it without difficulty be said that one carries on his business in the usual and ordinary way by destroying it.

That cannot be a usual thing, an ordinary thing, which from its very nature can happen but once. One might as well speak of an ordinary final day of judgment, or the usual and ordinary death of an individual.

b. This being so, it is *prima facie* evidence of fraud; *prima facie* evidence that a fraud on the bankrupt law was consummated; that is, *prima facie* evidence of every fact, the co-existence of which is necessary to constitute the fraud.

It raises a presumption that the vender was insolvent, or con-

templated insolvency; it raises a presumption that he intended to commit a fraud on the bankrupt law; it raises a presumption that the vendee knew, or had reasonable cause to know, the vendor to be insolvent; it raises a presumption that the vendee actually knew, or had reasonable cause to know, that a fraud on the bankrupt law was intended.

In other words, as soon as we show a sale out of the usual and ordinary course of the business of the vendor, we have made out a *prima facie* case, and can safely close, and it remains for the purchaser to overthrow the presumption; it remains for him to disprove all or some of the facts, the co-existence of which constitute the fraud.

Scammon vs. Cole et al. 3 B. R. 100,
Graham vs. Stark et al. 3 B. R. 95.
Kingsbury et al. vs. Hale, 3 B. R. 84.
Tuttle vs. Truax. 1 B. R. 169.
Driggs vs. Moore et al. 3 B. R. 149.
Wilson vs. Stoddard. 2 Chicago Legal News, 161.

In the case of Scammon vs. Cole,

FOX, J. said:

"It is too plain for argument that this mortgage was not in the usual and ordinary course of the bankrupt's business; it is, therefore, to be taken by me as fraudulent *unless the contrary is established.* The burden is on the respondents to explain the transaction. * * * The question raised by the statute is not the actual belief of the respondents, but is what they have reasonable cause to believe."

In the case of Graham vs. Stark, et al,

HALL, J. said:

"Unless the creditor has evidence sufficient to repel this legal presumption, he has reasonable cause to believe that the security is fraudulent and void under the Bankrupt Act." * * "A creditor cannot, by *shutting his eyes* when this statutory *prima facie* evidence of fraud is to be placed before him, escape

The sale itself, under such circumstances, necessarily resulted in a fraud on the creditors, and he is conclusively held to intend the necessary consequences of his act. It was such an act, and under such circumstances as would have compelled an adjudication under the 39th section.

The first *manifestation* of a fraudulent intention on his part is the letter he wrote his brother-in-law, to wit: that he wanted him to come to Kingsville to buy him out; that he thought his brother-in-law *could make something out of it.*

Now we submit that Mendelson, being so hopelessly insolvent, whatever Summerfield was to make out of the sale, just that much did he take from the *creditors.* It is unimportant now whether or not Summerfield did, in fact, make anything.

We are looking only to *Mendelson's intention.* It further appears that, on Summerfield's arrival, Mendelson estimated the goods at what he (Mendelson) considered them *fairly worth*, and *yet sold them for twenty-five per cent less than that!*

That is, he sold his creditors' goods for twenty-five per cent less than he himself considered them fairly worth, and that, too, to benefit his brother-in-law. We contend that this forever concludes the question of his intent. He had no right to sell his creditors' goods for $5,300 when he considered them fairly worth $7,100.

It occurs to us just here that the insolvent who will take one-quarter of his creditors' money to put in the pocket of his brother-in-law, will not scruple to take the remaining three-quarters to put in his own. We think the temptation is, at least, three times as strong.

Nor does the statement that he intended going into another business avail him any. In the first place, it does not *respond* to the *presumption* that he intended to *hinder*, *delay* and *defraud* his creditors.

And in the second place, it was a fraud on his part to metamorphose merchandise that he considered fairly worth $7,100 into merchandise worth but $5,300.

We submit that this is also conclusive against him. We are looking now simply to his own intention, and we say the unre-

butted presumption against him is wholly sustained by his own evidence.

3d. Summerfield knew, or had reasonable cause to know, that Mendelson was insolvent and contemplated insolvency, because:

a. The law *presumes* he did.

b. The presumption is unrebutted. There was no inquiry at all. On this point Mendelson testifies as follows: "I did not say anything to Summerfield about any debts that I owed to anybody; I don't believe that he knew that I owed anybody; if he did I didn't know anything of it."

This is *all* the evidence on that point. It is true that this is evidence to rebut the presumption of Summerfield's *actual* knowledge of Mendelson's insolvency, but it neither rebuts nor tends to rebut the presumption that he had *reasonable cause to know* Mendelson was insolvent.

As said in the first case cited in this brief, Scammon vs. Cole: "The question raised by the statute is not the actual belief of the respondents, but is what they have *reasonable cause to believe.*"

And in Graham vs. Stark, *et al.*: "No masterly inactivity, no self-imposed ignorance of what the circumstances call upon him to ascertain * * * can" help Summerfield.

So in Tuttle vs. Truax: "HE WAS PUT UPON INQUIRY, and should have taken steps to ascertain the condition of the debtor."

So in the other cases cited.

The main thing this record shows is that no one made any inquiry; no one made any attempt to ascertain Mendelson's condition; they simply hazarded the risk.

4th. Summerfield knew, or had reasonable cause to know, that Mendelson intended a fraud of some kind:

a. Because the law presumes he did.

b. The presumption is wholly unrebutted. *He does not testify he was unaware of such an intention.* Even if he had been, *in fact,* unaware of the actual existence of such an intention, yet *he had reasonable cause*

to believe that such was the intention. As in the next previous subdivision, the *unusual nature* of the sale imposed on him the *duty of inquiry*, and *that* he studiously avoided.

c. In *addition* to all this the evidence shows he was fully aware of the actual existence of the intent. He knew Mendelson was insolvent. He knew of the letter he had received. He knew the estimate Mendelson put on the stock; that he considered it fairly worth $7,100, and sold it to him for $5,300, which latter was to be again converted into what Mendelson considered $5,300 worth of *other merchandise.*

The establishment of these propositions annihilate the original sale of Mendelson to Summerfield. *It was void;* Summerfield took no title.

If he were defendant here, a judgment against him could not by any possibility be avoided, however erroneous instructions may have been on questions that need not have been submitted to the jury, and however improperly, on abstract grounds, cumulative evidence of fraud may have been admitted.

III.

The defendants having purchased from Summerfield a title which they knew to be presumptively invalid, had cast upon them the duty of upholding not only their own title, but also that of their vendor, on the ground that *they knew its nature.*

When Summerfield first approached the defendants to sell them the stock, he told them from whom, and how he had purchased. Ritter, one of the defendants, went with Summerfield to Kingsville, stayed over night at the house of Mendelson, was there introduced to him, and was fully informed of the circumstances attending the sale to Summerfield.

From those circumstances, the defendants knew that the law

declared the title of Summerfield *prima facie* void. They knew it was *prima facie* fraudulent and void.

They knew that if it was assailed it would fall, unless Summerfield could uphold it by proof sufficient to overcome the presumption; that his title depended simply and solely upon his ability to furnish that proof; that it was *conditioned* upon the existence of that proof; that he had no title without that proof. They took the title from Summerfield knowingly, "with all its imperfections on its head."

Summerfield had a doubtful, defeasible, uncertain, a *conditional* title. There was written across the face of his title, as if by the legislative hand in unmistakable terms,—"Mr. Summerfield having purchased this property out of the usual and ordinary course of Mendelson's business, the law presumes his title to be fraudulent and void. Mr. S. has no title, if attacked, unless and only upon condition that he can affirmatively establish its fairness by proof sufficient to repel the legal presumption. Let all purchasers from him—with knowledge that he acquired title out of the ordinary course of Mendelson's business—beware! They take the hazard of *Summerfield's inability to prove the fairness of* HIS *title!*"

Such was the title the defendants bought, and with full knowledge of its nature.

The condition has not been fulfilled, and the title falls.

How can it be said that they took from Summerfield a title of a *different* nature from what *he* possessed, when *they knew just what its nature was?*

It is not necessary for us to show that the defendants were actual parties to a fraud; we have only to show that they knew what they were purchasing; knowing that they took no more than Summerfield had to give them; knowing that their title depends absolutely on his; stands with it and falls with it.

This precise point was expressly decided by that great judge, Chancellor Sugden, in Molony vs. Kernan, 2 Dru. and War. 31.

In that case a principal had executed a valuable lease to his agent. The agent then sold the lease. The principal afterwards filed a bill against his agent, and the purchaser, to annul the lease on the ground of concealment and fraud.

The purchaser pleaded that whatever fraud the agent may have practiced on his principal, he was ignorant of it; and that he had purchased the lease from the agent in perfect good faith. The chancellor held that while an agent could take a lease from his principal, still if it were attacked, the presumption of law would be against its validity, and the burden would be on the agent to establish its fairness; that in the present case the purchaser from the agent knew his vendor was agent at the acquisition of the lease, knew therefore the agent's title was *prima facie* void because of the fiduciary relation, and the purchaser was therefore bound to show not merely that he had dealt in good faith with the agent, but also that the agent had dealt in good faith with the principal.

His language is:

"An agent may take a lease, but a party who buys from an agent with distinct notice that the party with whom he is dealing is an agent, has cast upon him the liability of sustaining the lease *just as much as the agent* himself. And if the lease could not be upheld by the agent, neither could it be supported *by a purchaser from that agent*, if he deals with him in his character of agent."

This language is emphatic and unmistakable, and proceeds upon the idea that the agent's lease was *prima facie* void by virtue of his fiduciary relation, that the purchaser knew this fact, and knowing it, he could take no other or better title than he knew he was getting. The logic and the reason of this rule seem to us alike irresistible.

IV.

This chain of argument left nothing for the Jury to pass on but these two questions:

1st. Whether the sale to Summerfield was a sale of the whole stock; and

2d. Whether the defendants, when they bought, knew that Summerfield had acquired the title in that way.

There was nothing else to pass on, and those two questions were submitted to the Jury. The instructions are far too favor-

able to defendants, inasmuch as they submitted other questions.

Hitherto we have argued the case without reference to any alleged errors in the instructions, but

V.

The instructions as a whole are proper.

1st. It is true that isolated portions, taken by themselves, may not, as abstract propositions, be strictly accurate, but even these portions related only to the transaction as between Mendelson and Summerfield, and were fully and frequently corrected in subsequent portions of the charge. And the instructions are particularly explicit when they come to speak of the liability of the defendants.

As to the transaction between Mendelson and Summerfield, the charge says: "Your attention is next directed to the provisions of law already cited, namely, that if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of the business of the debtor, Mendelson, the fact shall be *prima facie* evidence of fraud. By *prima facie* evidence is meant that the law presumes it to be fraudulent. It is, however, a *presumption only*, and *may be rebutted.*

What the law means to say is, that if this sale by Mendelson was not in the usual and ordinary course of his business, the law will treat it as fraudulent, *until it is shown to have been in good faith.*" Record, p. 29.

And again:

"Was the sale from Mendelson to Summerfield in the usual and ordinary course of business? You are instructed that if you find from the evidence that Mendelson made sale of the whole stock of goods on hand, and that by such a sale the business which he had been carrying on stopped and ceased to exist, such a sale was not in the ordinary course of the business of Mendelson, and will be held under the law to have been *prima facie* fraudulent, and will be so considered by you unless you shall be satisfied from the testimony in the case that it was made in *good faith.*"

Rec. pp. 29 and 30.

One would suppose that by this the question of intent, as between Mendelson and Summerfield, was sufficiently submitted to the jury; but when we come to the defendants, the charge is particularly explicit. Thus:

"*It is not, however, sufficient* in this case to find the sale from Mendelson to Summerfield to have been either void or fraudulent.

In order to find the issues *against* Walbrun, Bro. & Co., you must be satisfied *that they participated* in the fraudulent sale, or, *at least*, had reasonable cause to know the sale to have been fraudulent."

Rec. p. 30.

This was the important point, for the question in the case was as to the liability *of these defendants*, and as to this, the court instructed the jury not only as to what was not sufficient, but also as to what was absolutely necessary for them to find, in order to find the issues against Walbrun, Bro. & Co.

To use the language of this Court:

"A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and can not mislead the jury."

Rogers vs. The Marshal, 1 Wall. 654.

2d. In point of fact, as shown earlier in this brief, the instructions were far too favorable to the defendants.

The plaintiff had made out such a case, under the law, that the burden of proof was on the defendants.

See also Toof vs. Martin, 13 Wall. 40.

The *prima facie* case was not *in any degree* attacked, and the only questions that need to have been submitted to the jury were whether the sale to Summerfield was a sale of the whole stock, and whether the defendants at the time of their purchase knew this fact. This we have already sufficiently presented.

In Otto vs. Bent, 48 Mo. p. 26,

WAGNER, J. said:

"Notwithstanding the error of this instruction, we can not reverse the judgment for the reason that it did not materially

affect the merits of the action. There was in fact no evidence worthy of consideration to sustain the defense. * * * If there had been evidence to sustain the defense, a new trial should be granted; but this court ought not to set aside a judgment where the record shows that no other result could be had by a new trial."

And in this court, in Bevans vs. The United States, 13 Wall. 56, there being no defense established, it was held:

That where there are no disputed facts in the case, the court may properly tell the jury in an absolute form how they should find.

VI.

As to the admission of the evidence complained of:

1st. It was certainly competent for the plaintiff to show that at the time of the alleged purchase, Summerfield was pecuniarily worthless, and not possessed of the money to which he testified.

The fact is, the case had two aspects, viz.:

a. That the sale to Summerfield was an actual one, but fraudulent, in which fraud the defendants, at the time of their purchase, had reasonable cause to believe; or,

b. That the sale to Summerfield was not actual, but was a mere sham sale, and the subsequent transfer to defendants ostensibly by him but really by Mendelson.

The evidence of Summerfield's pecuniary worthlessness was, therefore, most material as one of the elements tending to support the latter theory, and especially so when accompanied by proof that his pecuniary worthlessness was known to the defendants, together with all the other circumstances attending the transaction.

Nor was it for the court arbitrarily to determine which of the two theories of the case the jury might find to be the true one. The question involved was fraud or no fraud, and in such inquiries a large latitude is allowed. (Butler vs. Watkins, 13 Wall. 456.)

2d. As to the schedules and Mendelson's statement that he had lost the money, the defendants cannot complain:

a. Because, in the first place, they were so immaterial they could not have prejudiced the defendants.

As stated by TREAT, J., in disposing of this case in the Circuit Court, with reference to Mendelson's statement that he had lost the money he got from Summerfield: "The fact thus stated by him, whether true or not, was not made the basis of any suggestion or instruction, and at most was treated as an irrelevant and immaterial matter, from which none of the parties could be prejudiced, *and least of all the defendants.*" (See 6 N. B. R. page 359.)

And as to the bankruptcy record including the schedules, TREAT, J., said: "Though the schedules were thus introduced as a part of that record, no use was made of them, inasmuch as the fact of Mendelson's insolvency at the time of the sale was admitted. Thus the question presented by the counsel in that respect does not arise."

The truth and force of these remarks are so apparent that further comment need not be made except to add that they are especially weighty considering the instruction: "It is not, however, sufficient in this case to find the sale from Mendelson to Summerfield to have been either void or fraudulent. In order to find the issues against the defendants, you must be satisfied that they participated in the fraudulent sale, or, at least, had reasonable cause to know the sale to have been fraudulent." Improper testimony, to be ground of reversal, must be detrimental, and work injury. (Nailor vs. Williams, 6 Wall. 107.)

b. Even if these facts were substantially prejudicial to the defendants, still the testimony in the case would have warranted the jury in finding a conspiracy, and on that ground they were clearly admissible. (Lincoln vs. Claflin, 7 Wall. 132.)

This court found an actual fraud on facts far less strong than are in this record. (Kempner vs. Churchill, 8 Wall. 369.)

In the present case Mendelson was insolvent; was in a losing business; he seeks a purchaser; he seeks but one; that purchaser is his brother-in-law; that brother-in-law was pecuniarily worthless and wholly ignorant of the business he was buying; the brother-in-law takes with him, from a large city—St. Louis—filled with banks, enough money *in currency* to pay for a stock he was not sure of purchasing, and the value of which he did not know; he makes no inquiry; the purchase is concluded at once and the money paid; the purchaser does not take possession—he leaves Mendelson in possession several days, who sells he knows not how much; the purchase price paid in greenbacks; no one present at the time; all these facts known to Ritter; he saw Mendelson in possession; stayed over night at Mendelson's house; knew the sale was of the whole stock, to a brother-in-law, Summerfield; that Summerfield was not a rich man; knew that Summerfield was in an entirely different business; knew that Mendelson had been selling from the time of the original sale to Summerfield; that no estimate was made of these sales, nor any deduction made from the original invoice. Ritter knew that under the bankrupt law the sale (if any) to Summerfield was, *prima facie*, void, and under the State statutes absolutely void for the reason there was no absolute transfer of possession. Yet Ritter made no inquiry; he did not speak to Mendelson about the stock until after he had bought. Ritter also took with him from Chillicothe the purchase price in currency, and, like Summerfield, paid it while no one else was present. He paid it, too, in extraordinary and "most unrighteous haste." Ritter had gone to Kingsville for no other purpose in the world than to do two things, to wit: to see that the goods *tallied* with the invoice, and to see that they equaled Summerfield's representations; to satisfy himself of this before paying the money. He went. He succeeded in finding out that Mendelson had been steadily selling some indefinite quantity for several days; he failed to invoice. He failed to find the goods equaled Summerfield's representations; he succeeded in finding just the contrary; he

complained of them; Summerfield then wanted to close at once; Ritter, however, wanted to invoice clear through—said if they would hurry they would soon finish.

This was in the morning. They at once ceased making the invoice, immediately boxed up the goods and shipped them away. Summerfield did not leave town, however, *until late that night.* Ritter had, however, paid him the money in the meantime! All because he saw the goods did not tally with the invoice, and because the goods did not equal representations!

After Summerfield's departure, Mendelson and Ritter exeunt together, and together go to Chillicothe, where Mendelson opens a dancing school.

No wonder Judges Treat and Dillon felt warranted in saying that "the verdict was obviously for the right party."

At all events, taking the case most favorably for the defendants, there was an abundance of evidence to go to the jury on the question of conspiracy, and if so, the testimony complained of was admissible and would be no ground of reversal, even if it were substantially prejudicial to the defendants.

And if the defendants had wished an instruction on the question of conspiracy, they should have asked for one.

3d. It was also certainly competent for plaintiff to show that, after the supposed sale from Mendelson to Summerfield, the former continued in possession as before, continued to sell and was so found in possession by Ritter, especially in view of the fact that no new invoice was made nor any account taken of the sales.

It went not only to show that Ritter knew thereby who was the original owner, but it went to the very gist of the fraud.

This is particularly true in view of the statute of Missouri, that a sale of personal property, to be valid, must be followed "by an actual and continued change of the possession of the things sold."

1 Wagn. Stat., 281, Sec. 12.
Allen vs. Massy, 1 Dillon.
Claflin vs. Rosenberg, 42 Mo., 439.

4th. Finally, all this evidence that is objected to was merely cumulative of the *prima facie* case made out by the plaintiff, in

which the presumption raised by the law was not only not successfully met by the defendants, but was not met at all.

And on this ground alone we are entitled to an affirmance on every question in the case.

NATH'L MYERS,

for Babbitt, D. E.